Supreme Court, U. S.
FILED
NOV 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974
NO. 74-532

CHESTER MCKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

ROBERT EUGENE SMITH, Esq.
GILBERT H. DEITCH, Esq.
Suite 2005
100 Colony Square
Atlanta, Georgia 30361

Attorneys for Petitioner.

Of Counsel:

FERRIS S. RITCHEY, JR., Esq.
Birmingham, Alabama 35209

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

INDEX

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 5

Statement 5

Reasons for Granting the Writ 7

Conclusion 23

Appendix A 1

Appendix B 15

TABLE OF CITATIONS

Cases

Baldwin v. New York, 399 U.S. 66 (1970) 7
Calder v. Bull, 3 Dall. 386, 390 15
Connolly v. General Construction Co., 269 U.S. 385, 391 .14
Davis v. Alaska, ____ U.S. ____, 39
L.Ed.2d 347 (1974) 16
Dejone v. Oregon, 299 U.S. 353 20,21
Dombroski v. Pfister, 380 U.S. 479 20,21,22
Douglas v. Alabama 16
Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). 13
Hamling v. United States, ____ U.S. ____, 41
L.Ed.2d 590 (1974) 18,19,21,22
In re Winship, 397 U.S. 358 (1970) 7,16

Page

Keyishian v. Board of Regents of New York, 385 U.S. 589 20,21
Kring v. Missouri, 107 U.S. 221, 235 15
Lanzetta v. New Jersey, 306 U.S. 451, 453 14
Memoirs v. Massachusetts, 383 U.S. 413 4,9,11,20
Miller v. California, 413 U.S. 15 ... 2,6,7,8,9,10,11,12,20,22
NAACP v. Button, 371 U.S. 415 20,21
Palmer v. City of Euclid, 402 U.S. 544 (1971) 14
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 14
Pointer v. Texas, 380 U.S. 400 16
Rabe v. Washington, 405 U.S. 313 (1972) 12
Roth v. United States, 354 U.S. 476 (1957) 19
Shelton v. Tucker, 364 U.S. 479 20,21
Smith v. California, 361 U.S. 147 (1959) 18,19,21
Speiser v. Randall, 357 U.S. 513 21
United States v. Baranski, 484 F.2d 556 (CA-7 1973) 21
United States v. Dellinger, 472 F.2d 340 (CA-7 1972) 21
United States v. Harriss, 347 U.S. 612, 617 13
United States v. Spock, 416 F.2d 165 (CA-1 1969) 21
Vachon v. New Hampshire, ____ U.S. ____, 38 L.Ed.2d 666 (1974) 17
Visual Educators, Inc. v. Koeppell, 268 So.2d, 22 (1972) .. 9
Watkins v. U.S., 354 U.S. 178, 208 (1957) 9
Wright v. State of Georgia, 373 U.S. 284 (1963) 14

Miscellaneous

United States Constitution
First Amendment 3,4,5,6,10,20,21
Fourth Amendment 6
Fifth Amendment 3,4,5,6
Sixth Amendment 3,6
Fourteenth Amendment 3,4,5,6
U.S.C., Article 1, Section 9 5,14
U.S.C. Title 28, Section 1257(3) 2
Code of Alabama, Title 14, Section 374 .. 2,3,4,5,7,8,9,18,22

IN THE

Supreme Court of the United States

OCTOBER TERM 1974
NO. _____

CHESTER MCKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Alabama entered in the above case on May 9, 1974.

OPINION BELOW

The Opinion of the Supreme Court of Alabama is appended hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 9, 1974. Mr. Justice Powell of this Court granted to Petitioner an extension to November 3, 1974 within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 U.S.C.* §1257(3).

QUESTIONS PRESENTED

1. Whether the provisions of Title 14, Section 374, Code of Alabama, on its face and as construed and applied to authorize the judgments of conviction of Petitioner herein, were, prior to June 21, 1973, unconstitutionally vague, violating the First, Fifth and Fourteenth Amendments, because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California,* 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary, terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films appeal to the prurient interest of the

average person in the Nation as a whole, which test this Court labelled "unrealistic";

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous".

2. Whether the trial and conviction of the Petitioner under Title 14, Section 374, Code of Alabama, without determination of the obscenity *vel non* of the materials as a material element of the offense violated the First, Fifth, Sixth, and Fourteenth Amendments, because:

(a) The Petitioner was deprived of his right to a fair trial and due process of law because a material element of the offense, obscenity, was not tried and proved, that element being "incorporated" by a prior civil determination of obscenity to which the Petitioner was not a party;

(b) The Petitioner was deprived of his right to a fair trial and due process of law because statute denied him the right of confrontation.

3. Whether the provisions of Title 14, Section 374, Code of Alabama on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, under a standard for judging *scienter* solely by alleged proof of a general knowledge of the nature of the materials involved, and without competent evidence to establish even that Petitioner had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioner of his

libery and property without due process of law, in violation of the First, Fifth, and Fourteenth Amendments.

4. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein where the Indictment, trial and convictions of Petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413, and where the Government presented no evidence that the publications and film exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First, Fifth, and Fourteenth Amendments.

5. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications named in the Indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First, Fifth and Fourteenth Amendments.

6. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs and Miller* tests by the

Supreme Court abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the guarantees of the First, Fifth and Fourteenth Amendments and Article I, §9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth, Eighth and Fourteenth Amendments, and Article I, §9 of the Constitution, and the pertinent provisions of Title 14, Section 374, Code of Alabama, appear in Appendix B hereto.

STATEMENT

1. The Petitioner was charged by Complaint that he:

> within twelve months before the commencement of this prosecution, did with knowledge of its contents, exhibit, sell and have in his possession with intent to sell, obscene printed or written material; said material known by him to have been judicially found to be obscene under the provisions of Alabama law, to-wit: a magazine entitled "New Directions Number 16 Volume 4 Number 4," in violation of the Code of Alabama 1940 as recompiled in 1958, Title 14, Section 374(4) pocket part, against the peace and dignity of the State of Alabama.

The verdict of the Jury was rendered on November 10, 1971, the Petitioner being found guilty. He was sentenced to pay a fine of $2000.00 and incarceration for twelve (12) months.

2. Various motions by the Petitioner going to the issue of the exclusion of the obscenity *vel non* question, motions to exclude evidence, and objections to the introduction of evidence from the prior civil action, all of which raised Petitioner's constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments, were overruled by the trial court.

The State just introduced evidence as to the sale of the magazine, and over objection, the determination of the civil finding of obscenity. The trial court instructed the jury that the only issue of fact for their determination was whether or not the Petitioner had sold a magazine judicially declared obscene in an action to which he was not a party.

3. On June 29, 1973, the Alabama Court of Criminal Appeals affirmed the conviction without opinion, and also denied an application for rehearing on July 26, 1973.

4. On May 9, 1974, the Supreme Court of Alabama, upon a Petition for a Writ of Certiorari, affirmed the conviction. The Court, looking at the 1961 Act under which the magazine was declared obscene, held, *inter alia:*

(a) That it was constitutional under the standards enunciated in *Miller v. California,* 413 U.S. 15;

(b) That the relevant community was the State of Alabama;

(c) That the civil action declaring the magazine obscene "established the status of the res, and the decree as to the status of the res was conclusive against all the world as to that status.";

(d) That "the status of the res, 'New Directions' being established, and there being no change in the standards of obscenity under the statute from the time of the Mobile hearing to the trial below, no evidence of obscenity, *vel non,* was required in this case."; and

(e) "The standards under our statute were the same ante *Miller* as they were post Miller." (See Appendix A).

5. The dissenting opinion of Chief Justice Heflin, with whom Justices Coleman, Bloodworth and Jones concurred, held, *inter alia,* that:

(a) the Petitioner was denied a jury trial by the failure of the State to prove and the jury to find the magazine obscene as an essential element of the charged crime, citing *Baldwin v. New York,* 399 U.S. 66 (1970) and *In re Winship,* 397 U.S. 358 (1970).

(b) the Petitioner was denied the right of confrontation because of the use of res judicata or collateral estoppel preventing the Petitioner from defending on the element of obscenity *vel non.*

6. The Supreme Court denied an Application for Rehearing on June 6, 1974.

REASONS FOR GRANTING THE WRIT

1. State law as written or authoritatively construed, under which obscene materials are regulated, must comply with the First Amendment standards set forth in *Miller v. California,* 413 U.S. 15. Title 14, Section 374, Code of

Alabama as it was written at the time Petitioner was arrested, tried and convicted in these cases, did not comply with the standards set by *Miller*. Nor has that ordinance been "authoritatively construed" to include the *Miller* safeguards. *Miller* says that State statutes which regulate obscene material must be carefully limited. And,

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

And further, that,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard-core" sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California*, supra.

Title 14, Section 374(3), Code of Alabama provides that:

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

Nowhere does this statute regulate the depicting or describing of sexual conduct as required by *Miller*, supra. Nor has this statute ever been "authoritatively construed" to regulate only that specific depiction or description of sexual conduct. For this reason, Title 14, Section 374, Code of Alabama, at the time Petitioner was arrested, tried and convicted, was unconstitutional since it failed to comply with the constitutional standards set out in *Miller v. California*.

Perhaps it can be argued that Title 14, Section 374, Code of Alabama was constitutional in light of the law at the time the Petitioner was arrested. In 1970, perhaps it was constitutional. Now, post-*Miller*, it is not. In *Visual Educators, Inc. v. Koeppell*, 268 So.2d, 22 (1972), the Alabama Supreme Court followed the decisions of this Court in incorporating the *Memoirs* requirements in the application of the State statute in order to make it valid. However, this Court has now abandoned *Memoirs v. Massachusetts*, 383 U.S. 413, (1966), and its tests, in particular the test of "utterly without redeeming social value." However, no member of this Court today supports the *Memoirs* formulation. Without the *Memoirs* test to rely on, Title 14, Section 374 is without support and therefore becomes impermissibly vague for the reasons set out above.

It is the position of Petitioner that the statute under which he has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 (1957).

In *Miller v. California*, 413 U.S. 15, this Court promulgated a new constitutional standard for determining obscenity. Mr. Chief Justice Burger stated that:

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., vs. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

Further, Mr. Chief Justice Burger, stated that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials this his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

Miller v. California, supra is the key case in which this Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that this Court undertook to forumulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when

this Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by this Court in *Miller v. California,* supra, as far as specifically designating prohibited material is concerned. This Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and this Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

Clearly, if the provisions of the State statute are limited to press mateials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the State, or if specific hard core sexual conduct has been read into the statute by authoritative judicial construction, the present statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Alabama Legislature to create legislation anew, adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the Courts. Before the appellate courts can so construe, there must exist a constitutionally permissible statute with which to work. The present Alabama statute cannot be authoritatively construed to meet the *Miller* test of specificity. Any case, criminal or civil, pending trial or appellate review, based on the present statute which clearly does not contain the *Miller* test of specificity, should be set aside. It is clear that any attempt at authoritative judicial construction by the appellate courts of Alabama incorporating the *Miller* test must fail at this juncture because the statute as written fails to give any person

fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

This Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of Law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction punishes one for conduct that was not criminal at the time it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Alabama statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held criminally responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

Just recently this Court reiterated that "(i)t is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined."

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if

> arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on a ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone that if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

2. The Court's failure to strike down the applicable statute as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retroactively, and which will operate precisely like an *ex post facto* law. All those actions done before this Court's announcement of new standards and which were done innocently under the old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the Constitution from passing laws of this nature and surely the Supreme Court of Alabama and the various trial courts must be barred by the Due Process clause from achieving precisely the same results by judicial construction.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *United States v. Harriss*, 347 U.S. 612, 617.

The Due Process clause of the *Constitution* requires that a Court strike down a criminal statute where it was not

"sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

This Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of Law, and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453. See also. *Rabe v. State of Washington*, 405 U.S. 313 (1972); *Wright v. State of Georgia*, 373 U.S. 284 (1963); *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

If the principles promulgated by this Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner herein for alleged conduct said to be violative of the statute at a time during 1970, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10, of the *United States Constitution*, because the State would be punishing Petitioner for conduct not criminal at the time he committed it, in that the said criminal statute did not give fair warning of the conduct which it prohibits, and the standards to be applied.

An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law,

and which was innocent when done, criminal; and punishes such action", or "that *aggravates* a *crime*, or makes it *greater* than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (emphasis supplied).

This Court has said that "no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *Kring v. Missouri*, 107 U.S. 221, 235.

Until such time as the State of Alabama enacts new legislation specifically defining prohibited "hard-core" sexual conduct, or until such time as the Supreme Court of Alabama authoritatively construes the statute to specifically define hard-core sexual conduct, to thus give fair notice to future defendants, there is no constitutionally permissible statute regulating obscenity.

3. The Trial Court viewed the sole issue in the case as being "whether or not the Defendant had knowledge that a particular publication had been judicially determined to be obscene and with that knowledge did he sell or intend to sell the publication." Therefore, the obscenity of the publication, which was not conceded (and is not in this Court) was not passed upon by the jury. The Petitioner should have been able to have the issue of obscenity litigated in his trial, if for no other reason than that in a criminal trial, a defendant has a right to have every element of the crime proven against him beyond a reasonable doubt. Therefore, if the Trial Court viewed the obscenity as having been proven, then it was only by a civil burden of proof, that is, by a preponderance of the evidence.

It is admitted by the State that Petitioner was not a party to the civil proceeding in which the publication named in the decree was found obscene. Since the decree was conclusive in Petitoner's trial on the issue of obscenity and Petitioner was not allowed to cross-examine the witnesses, if any, proving the magazine was obscene, or the Judge in that action, Petitioner was denied his right to confront the witnesses against him on that issue. *Pointer v. Texas,* 380 U.S. 400; *Douglas v. Alabama.*

These infirmities of Title 14, Section 374(4) and of the Petitioner's conviction thereunder were clearly pointed out in Chief Justice Heflin's dissent (see Appendix A). He stated that "the state has attempted to circumvent the usual criminal process by using a civil judgment as conclusive proof of one essential element of the criminal act ... In the case at bar, the statute operated to deny the defendant his right to a jury trial on the most essential element for which he may be condemned – i.e., the obscenity of the matter sold – and he was denied his right to the protection of the criminal burden of proof. *In re Winship,* 397 U.S. 358 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt ...").

This Court recently reaffirmed the right of confrontation in *Davis v. Alaska,* ____ U.S. ____ 39 L.Ed.2d 347 (1974). Mr. Chief Justice Burger wrote that:

> "we ... conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof ... of petitioner's act.' Douglas v. Alabama, supra, 380 U.S. at 419, 13 L.E.d2d 934. The accuracy and truthfulness of Green's testimony was a key element in the State's case against petitioner.

* * *

> Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1,3 [16 L.Ed.2d 314, 86 S.Ct. 1245]." Smith v. Illinois, 390 U.S. 129, 131, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968)."

____ U.S. ____, 39 L.Ed.2d at 354-55.

And in a *per curiam* opinion this Court held that a conviction for wilfully contributing to the delinquency of a minor, violated due process because there was no evidence at trial that the defendant sold the item in question, that he knew it had been sold to a minor, that he authorized such sales to minors, or that he was in the store at the time of the sale. *Vachon v. New Hampshire,* ____ U.S. ____, 38 L.Ed.2d 666 (1974). This Court held that:

> This fatal void in the State's case was not filled by appellant's concession at trial that he "controlled the premises on July 26." That concession was evidenced at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.
>
> In these circumstances, the conviction must be reversed. "It is beyond question, of course, that a conviction based on a record lacking any relevant

> evidence as to a crucial element of the offense charged . . . violate[s] due process." Harris v. United States, 404 U.S. 1232, 1233, 30 L.Ed.2d 25, 92 S.Ct. 10 (1971). (Chambers opinion of Douglas J.); Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, 80 ALR2d 1355 (1960); Johnson v. Florida, 391 U.S. 596, 20 L.Ed.2d 838, 88 S.Ct. 1713 (1968); see also Adderley v. Florida, 385 U.S. 39, 44, 17 L.Ed.2d 149, 87 S.Ct.242 (1966).

____ U.S. ____, 38 L.Ed.2d at 669.

Thus, as the Petitioner herein was not permitted to defend himself on the crucial issue of obscenity *vel non*, he was deprived of a fair trial and due process of law.

4. *Title 14, Section 374, Code of Alabama* and the Complaints filed against the Petitioner do not clarify what meaning is attributed to the word "knowingly", nor was "guilty knowledge" proved at the trial. The statute and the Complaints were required to set forth precisely the degree of "guilty knowledge" that a Defendant is required to defend against. Moreover, as we demonstrate hereinafter, actual "guilty knowledge" of the nature, contents, and character of the material is constitutionally required. See *Hamling v. United States*, ____ U.S. ____ 41 L.Ed.2d 590 (1974).

In *Smith v. California*, 361 U.S. 147 (1959), this Court held that the strict liability feature of the California obscenity law was unconstitutional. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. 160.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by the Court in *Smith v. California*, supra. Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex does not meet the tri-partite knowledge requirements of *Hamling*, supra. Mere proof that a publisher, landlord, or distributor knows that he distributes "Tropic of Cancer", "Lady Chatterley's Lover", "Fanny Hill", "Pleasure is My Business", "Lust Pool", "Shame Agent", "Sin Hooked", "Lust Job", "Sex Life of a Cop", "Solis", etc. in no way establishes, it is submitted, that such publisher or distributor knows the nature, character and contents of those publications. The decision of this Court make this abundantly clear. It is likewise clear that the statute in question herein permits such a strict liability. And the problem is further compounded by the statute's and the court's preclusion of the Petitioner from defending on the issue of obscenity *vel non* at all.

Mr. Justice Rehnquist has defined the requisite criminal knowledge for obscenity convictions: "It is constitutionally sufficient that the prosecution show that a defendant *had knowledge* of the contents of the materials he distributes, *and* that he *knew* the character *and* nature of the materials". *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590 (1974) (emphasis supplied). Even though knowledge of a material's legally obscene status is not required, and thus traditional *scienter* is not required for the class of speech crimes *qua* obscenity crimes (see *Hamling* and *Smith* supra), *actual* knowledge of the contents, nature, and character of the material *is* required for conviction. From *Roth v. United*

States, 354 U.S. 476 (1957), through *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), to *Miller v. California,* 413 U.S. 15 (1973), this Court has been attempting to define what is "obscene" and whether or not the obscenity laws, state or federal, give an accused adequate notice of what is proscribed. If nothing else, seventeen (17) years of constitutional adjudication have indicated that the laws of this country, and its courts, have been somewhat confused. If actual knowledge of the contents, nature, and character of materials is required for a conviction of the substantive offense, then at least that actual knowledge must be *found* before one can be found guilty of violating the law. Thus, the mere showing of a "managership," possession or sale without proof of actual knowledge of the nature, character, and contents of materials is insufficient as a matter of constitutional law to uphold the convictions herein.

First Amendment rights have the highest standards of protection in the American system of jurisprudence, and those rights may only be disturbed when there exists a demanding, overriding, and compelling state interest, and even then such incursions are to be severely limited. *Dombroski v. Pfister,* 380 U.S. 479; *Keyishian v. Board of Regents of New York,* 385 U.S. 589; *Dejone v. Oregon,* 299 U.S. 353. If speech is to be regulated at all, such regulation is to be narrowly drawn so as not to impinge on rights that are properly beyond the sphere of that narrowly conceived area of governmental reguilatin. *NAACP v. Button,* 371 U.S. 415; *Shelton v. Tucker,* 364 U.S. 479. Where statutes on their face or as applied are vague and overbroad, then the chilling effect *Dombroski* warns of rears its ugly head.

There is a lack of Due Process of Law and fundamental fairness when persons cannot be adequately forewarned that

their presumptively lawful activities might someday be used against them in a criminal prosecution. People tend to steer far away from activity that might later be termed "dealing in obscenity" and the chilling effect on protected activity becomes clear. *Speiser v. Randall,* 357 U.S. 513; *NAACP v. Button,* 371 U.S. 415.

In order to avoid self-censorship and a chilling effect on *First Amendment* freedoms, see *Smith v. California,* 361 U.S. 147; *Dombroski v. Pfister,* 380 U.S. 479, then it is necessary that convictions be based on a *knowing* violation of the law, i.e., a *knowing* sale, distribution or possession with intent to disseminate of *obscene* material *with knowledge* of its contents, nature, and character. See *Hamling,* supra.

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from the free exercise of those rights. "So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski,* supra, at 494. See, *NAACP v. Button,* 371 U.S. 415; *Keyishian v. Board of Regents of New York,* 385 U.S. 389; *Speiser v. Randall,* 357 U.S. 513; *Shelton v. Tucker,* 364 U.S. 479; *DeJonge v. Oregon,* 299 U.S. 353; *United States v. Baranski,* 484 F.2d 556 (CA-7 1973); *United States v. Dellinger,* 472 F.2d 340 (CA-7 1972); *United States v. Spock,* 416 F.2d 165 (CA-1 1969):

> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute

> contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by the burdens of defending prosecutions, however expenditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

Dombroksi, supra, at 490-491.

The obscenity statute here involved, Title 14, Section 374, Code of Alabama, purports to punish the knowing possession, sale or distribution of obscene materials. It does not purport to punish the possession, sale or distribution of books or writings dealing with sex. *Scienter* means guilty knowledge. This means that the prosecution in any obscenity case must charge and prove that the Accused *knew* the contents, nature, and character of the material (see *Hamling,* supra), not merely that the Accused knew that the material dealt with sex.

There can be no question, it is submitted, if the obscenity statute is not to be unconstitutionally applied, that the Complaints must allege this knowledge. Without such allegations, the Complaints are fatally defective, and the convictions and the statute on which they are based are unconstitutional. See *Hamling v. United States,* ____ U.S. ____, 41 L.ed.2d 590 (1974), and *Miller v. California,* 413 U.S. 15.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Alabama.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
GILBERT H. DEITCH, Esq.
2005 One Hundred Colony Square
Atlanta, Georgia 30361
(404) 892-8890

Attorneys for Petitioner.
Of Counsel:

FERRIS RITCHEY, Esq.

APPENDIX A

THE STATE OF ABALAMA–JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1973-74

Ex Parte: Chester McKinney

PETITION FOR WRIT OF CERTIORARI
TO COURT OF CRIMINAL APPEALS

(Re: Chester McKinney
v.
State of Alabama)

FAULKNER, JUSTICE.

This is a pornography case involving the sale of a magazine entitled "New Directions" after it had been judicially found to be obscene.

"New Directions" is published in North Hollywood, California by Jaybird Enterprises, Inc. The masthead states that it is a "cultural, scientific, educational, and sociological publication produced and distributed to illuminate the conviction that the unclothed human body is worthy of respect and deserving of increased acceptance in our culture . . . Subscription rates, $14.00 per year. Second-class postage paid in North Hollywood, California." A review of its pictures contained in the magazine introduced into evidence as an exhibit reveal photographs of nude men and women exposing their genital organs in a revolting manner; male kissing female body near her genital organ; female kissing male in a like manner; females shown with their legs spread-eagle apart exposing their genital organs; male kissing the female breast; male sitting over female with his genital organ touching her mouth, and many more similar poses–the

magazine contains 61 pages in all. After review of pictures of these grotesque nudes, a person of reasonable sensibilities will conclude that it is no wonder God made man and woman to wear clothes. Without them some are the most unattractive animals in His kingdom.

"New Directions" was one of a number of magazines declared to be obscene in a decree rendered by the Circuit Court of Mobile County on February 26, 1970, in an action styled, *State of Alabama, ex rel Attorney General of Alabama, ex rel District Attorney of the 13th Judicial Circuit of Alabama v. The Magazine, "Jaybird U. S. A.", No. 16, Vol. 4, No. 4; The Magazine, "New Directions", No. 14, Vol. 4, No. 4, et al.*, Case Number 76399. Each of the magazines was determined to be mailable matter and each was declared to be contraband. There appears to be a typographical error in the style of the case which refers to No. 14, Vol. 4, No. 4 of "New Directions". The decree refers to No. 16, Vol. 4, No. 4.

On March 10, 1970, a State attorney accompanied by a State investigator, went to the Paris Bookstall, Birmingham, Alabama, a place of business operated by McKinney, and personally delivered a letter to McKinney informing him that "New Directions" had been judicially declared to be obscene. On March 31, 1970, these officers returned to the Paris Bookstall and purchased the magazine, "New Directions" from McKinney. While there, and with McKinney looking on, and in the presence of the investigator, the State attorney "flipped" through the pages of the magazine. Afterwards, they left, and the investigator signed a complaint charging McKinney with violating Title 14, § 374(4), Code of Alabama 1940, Recompiled 1958,[1] by selling obscene material which

---

[1] § 374(4). Importation, sale or possession of obscene printed or written matter; penalties.—[1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells,

had been judicially declared to be obscene. McKinney was convicted in a trial before a jury and was given the maximum sentence under the statute. Before retiring, the jury was charged by the court that the only issue of fact for them to decide involved the question of selling material judicially declared obscene as charged in the complaint.

McKinney appealed his conviction to the Court of Criminal Appeals. The appellate court affirmed the trial court without rendering an opinion. Upon his application for rehearing being denied, McKinney filed a petition for certiorari, alleging deprivation of constitutional rights; that this was a case of first impression. We granted certiorari.

(Footnote 1 continued)

exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

Neither McKinney nor the State introduced evidence in the trial on the question of obscenity, vel non. McKinney raised that issue in a motion to quash the complaint which the trial judge overrruled. A motion to exclude the evidence was also overruled by the trial court. The validity of the judgment of the Mobile Circuit Court was questioned by McKinney on objection to its introduction in evidence, first in the sense that he was not a party to the action, second that the State had to prove by affirmative evidence that the subject magazine was obscene in this trial.

The action in the Mobile Circuit Court was filed pursuant to the provisions of Act No. 856, § 5 through § 11, Acts of Alabama 1961, Vol. II. The court acting as trier of fact found the magazine to be obscene. The 1961 Act defines obscene to mean "lewd, lascivious, filthy and pornographic and *that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.*" (Emphasis added.)

The Act passes the constitutional test laid down by United States Supreme Court decisions. Under *Miller v. California,* ____ U. S. ____, 93 S. Ct. 2607, 37 L.Ed2d 419, the court set out new guides to use in regulating obscene material. State offenses must be limited to works which:

1. Depict or describe sexual conduct which is specifically defined by applicable State law (as written or authoritatively construed) and

2. Taken as a whole, appeals to the prurient interest in sex and

3. Portrays sexual conduct in a patently offensive way, and

4. Taken as a whole does not have serious literary, artistic, political, or scientific value.

The guide for determining what is "patently offensive" or appeals to the "prurient interest" is to be "the average person" applying contemporary community standards. We construe "contemporary community standards" to encompass the State of Alabama. National standards are not required under *Miller.* While a trial court may empanel a jury in an advisory capacity to measure the essentially factual issues of "prurient appeal" and "patent offensiveness" by the prevailing "contemporary community standards" it is not constitutionally required. *Alexander v. Virginia,* ____ U. S. ____, 93 S.Ct. 2803, ____ L.Ed.2d ____ (1973). Furthermore, when the material itself is placed into evidence, "expert" State testimony as to its allegedly obscene nature, or other ancillary evidence of obscenity, is not constitutionally required. *Kaplan v. California,* ____ U. S. ____, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973).

Constitutional safeguards are provided in the Act for one charged with violating its provisions. Section 5 provides for the institution of proceedings for an adjudication in a Circuit Court. (While this section provides that the action shall be filed in a Court of Equity, under the Rules of Civil Procedure adopted by this court on July 3, 1973, there is now only one form of action known as a "Civil Action". Rule 2, Rules of Civil Procedure.) Section 6 of the Act provides the type of complaint to be filed and the allegations which the complaint shall contain. Section 7 provides that an order to show cause shall be issued and service of same, upon the res and the person charged. Section 8 gives the respondent the opportunity to file defensive pleadings and permits answer by amicus curiae. Section 9 provides for maximum promptness of the hearing commensurate with constitutional requirements, including due process, freedom of the press, and freedom of speech. The burden is on the State to prove obscenity, vel non, in the adjudication of same.

Section 12 provides,

> "Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this State for sale or commercial distribution, or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of Section 4 of this Act."

We now decide the question of whether the Mobile Circuit Court decree was binding on McKinney since he was not a party to the action and since obscenity, vel non, was not permitted as an issue by the trial court.

The Mobile action was in personam and in rem. The magazine, "New Directions," the subject matter in this case, was one of the res declared by the court to be obscene. The decree of the court, which was not appealed, established the status of the res, and the decree as to the status of the res was conclusive against all the world as to that status. *McCann v. Ellis,* 172 Ala. 60, 55 So. 303 (1911). See *Brennen v. Ellis,* 173 Ala. 718, 55 So. 306 (1911); *Jones v. Adler,* 183 Ala. 435, 62 So. 777 (1913). See also *Toole v. State,* 170 Ala. 41, 54 So. 195 (1911), an in rem action against 114 barrels of beer for its condemnation where the court said the status of the property was to be fixed as to all the world.

The status of the res, "New Directions" being established, and there being no change in the standards of obscenity under the statute from the time of the Mobile hearing to the trial below, no evidence of obscenity, vel non, was required in this case.

The standards under our statute were the same ante *Miller* as they were post *Miller.* We conclude that McKinney, after due notice of the decree, was subject to criminal prosecution for selling material judicially declared obscene.

We note in passing what Mr. Justice Douglas said in his dissent in *Miller:*

> "If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific."

Justice Douglas contends that until there has been a civil proceeding placing the tract beyond the pale, there should be no criminal prosecution.

AFFIRMED.

Merrill, Harwood, Maddox, and McCall, J. J., concur.

Heflin, C. J., Coleman, Bloodworth, and Jones, J. J., dissent.

HEFLIN, CHIEF JUSTICE (Dissenting):

The defendant in this case was charged with violating Title 14, Section 374(4), Alabama Code of 1940, as amended (Recompiled 1958). That section provides:

> "Every person who, with knowledge of its contents . . . sells . . . or has in his possession with intent to sell . . . any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the

county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined, not more than two thousand dollars for each offense. . . . "

In defendant's trial before a jury, the allegedly obscene matter was entered into evidence, but the jury was charged that the only issue of fact for them to decide was whether the defendant sold material which had been judicially declared to be obscene. Thus there was no finding by the jury that the matter alleged to be obscene was obscene, and indeed no such determination could have been made under the trial court's charge.

In my opinion, the conviction of the defendant under the provisions of Section 374(4) set out above is constitutionally invalid in that the statutory procedure operates as a denial of due process of law because: (1) The defendant was denied his right to a trial by jury on a material element of an alleged offense, (2) the defendant was denied the protection of the burden of proof requirements in criminal cases, and (3) the defendant was denied his right of confrontation.

The procedure for obtaining a civil judicial determination of the obscenity of mailable matter is outlined in Sections 374(5)-374(16) of Title 14.

Without passing judgment on the constitutionality of the equity action itself, which is not here in issue, the operation of the statute can be summarized as providing the state an opportunity to have matter declared obscene and to obtain an injunction against *named respondents* prohibiting the sale or distribution of the offending matter by the *named respondents*. Section 374(12) purports to tie the injunction procedure to the punitive provisions of Section 374(4) which, in pertinent part, declares the sale or exhibition of mailable matter that has been judicially found to be obscene under Sections 374(5)-374(16) to be a misdemeanor.

While the legislature of this state has the power to declare certain acts criminal, this power is not unlimited. The state cannot punish as a crime, for example, acts which are specifically protected by the Constitution. Thus the state generally cannot make criminal the act of selling or exhibiting all books, photographs, drawings or other like matter because of the limitation imposed on the states by the First Amendment. Certain materials, however, because of their nature, have been held to lie outside the protective umbrella of the First Amendment. One class of matter which is not protected by the First Amendment is that which is said to be "obscene." Because obscene matter does lie outside the protective shield, the state's police power may be invoked to regulate such unprotected matter.

The regulation of obscene matter may take several forms, including criminal sanctions against those who traffic in it. For the criminal sanctions to be constitutionally permissible it is clear that there must be as a minimum some designated act such as a sale, exhibition, etc., of some unprotected (i.e., obscene) matter. The essential elements of the crime then are at least a (1) transaction involving (2) obscene matter. Each of these elements is a material ingredient without which there is no crime.

It is settled law that in a criminal prosecution the state must prove every essential element beyond a reasonable doubt. E.g., *Piano v. State*, 161 Ala. 88, 43 So. 803 (1909).

Whether the trier of fact is a judge alone or a jury, the burden is the same—every material element of the crime must be proved beyond a reasonable doubt. Where the right to a jury trial attaches, the right attaches to *every* element, and not just certain elements of the crime. In the case at hand, since the possible punishment was one year in jail and a fine of up to $2,000, there is no doubt that the defendant was constitutionally entitled to a jury trial. *Baldwin v. New York*, 399, U. S., 66 (1970).

In short, the state may make it a crime for a person to sell, exhibit, etc., obscene matter, but in prosecuting the person for that crime, the state must prove to a jury every element of the crime beyond a reasonable doubt.

Under this analysis, the infirmity of the statute becomes obvious. The state has attempted to circumvent the usual criminal process by using a civil judgment as conclusive proof of one essential element of the criminal act. (Injunctive proceedings were equitable until the new Alabama Rules of Civil Procedure went into force and effect. Now such proceedings are classified as non-jury under the merged one form of action. See Rule 2–ARCP.)

While it is conceded that there may be some set of circumstances under which such a procedure may be permitted, it cannot be utilized to prevent a criminal defendant from full enjoyment of his constitutional rights. In the case at bar, the statute operated to deny the defendant his right to a jury trial on the most essential element for which he may be condemned–i.e., the obscenity of the matter sold–and he was denied his right to the protection of the criminal burden of proof. *In re Winship*, 397 U. S. 358 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. . . .")

Furthermore, there is still another constitutional defect to the procedure. In effect, the state is attempting to statutorially engraft the principles of res judicata and collateral estoppel in a criminal prosecution. While arguably this legislative attempt could be challenged as a violation of the doctrine of separation and unconstitutional under the Alabama Constitution, Art. 1 Sec. 43, see *Broadway v. State*, 257 Ala. 414, 60 So. 2d 701 (1952) (no legislative competency to create a duty on the part of a court without exercising any discretion or judgment when a performance of that duty is an exercise of a judicial function), an even more obvious defect in the statute has been identified.

To permit the affirmative use of these concepts by the prosecution would violate another fundamental guarantee of the Bill of Rights–the right of confrontation. An excellent analysis of this problem is found in Hirsch & Ryan, I Know It When I Seize It: Selected Problems in Obscenity, *4 Loyola U. L. Rev.* 9, 76-81 (1971). In the author's hypothetical situation the assumption is made that the state convicts *A* in X County for selling obscene matter. Since the threshold issue in *A*'s case was the obscenity of the matter, *A*'s conviction operates as a judicial determination of the obscenity of the matter. The authors' analysis continues:

> "Subsequently, the People undertake prosecution of defendant B in Y county, or any number of defendants in numerous counties, concerning the identical material. The threshold issue is again the obscene nature of the identical material. The People may attempt to raise the prior adjudication on this element as the subsequent action(s) concerns the identical issue; there is a final adjudication on the merits by a court of competent jurisdiction; and the party against whom the adjudication is raised, the material, was a party to the prior adjudication. . . .
>
> * * * *
>
> "Were these concepts operative in a vacuum of pure theory, independent of other considerations, the foregoing would seem to permit the prosecution's utilization of these concepts in subsequent proceedings. However, to permit such affirmative use of the concepts by the prosecution would affront one of the fundamental guarantees of the Bill of Rights–the right of confrontation.
>
> "This guarantee was held applicable to the states in Pointer v. Texas [380 U. S. 400 (1965)]. Under the instant facts, the People, through utilization of

the prior in rem judgment of obscenity would, if permitted, supply the sine qua non of the in personam criminal proceedings merely by pleading that judgment and interposing the plea of collateral estoppel in answer to any defense attempt to litigate the issue of obscenity. The ultimate effect of such application would be to confront the defense with the core of the prosecutor's case, in documentary form with no provision for cross-examination or confrontation. Such procedures were early condemned indeed, were deemed of primary importance in the enactment of the Sixth Amendment.

"In relation to the concept of collateral estoppel, in a criminal proceeding, courts have been quite reluctant to allow its application in a manner adverse to the defendant. This reluctance is admirably presented in what may be considered the two leading cases in the field. United States v. Carlisi]32 F. Supp. 479 (E.D.N.Y. 1940)] stated the principle to be:

> In transplanting the doctrine . . . to criminal law . . . [a] prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt.

United States v. De Angelo [138 F. 2d 486 (3d Cir. 1943)] emphatically restated the foregoing:

> An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto.

> *While the foregoing decisions considered the applicability of the concept in the realm of a subsequent prosecution of the defendant in a prior action, the rationale precluding application if negative to the defendant is even more compelling in proceedings directed against an individual not an actual party to a prior proceeding, the results of which compel him to defend an in personam criminal proceeding."* (emphasis added) (Footnote omitted)

Furthermore, the case law of this state has long recognized the constitutional invalidity of using a previous civil action as res judicata in a subsequent criminal prosecution. In *Helms v. State,* 35 Ala. App. 187, 45 So. 2d 170 (1950) Judge (now Justice) Harwood summarized this state's law:

"[I]t is clearly settled by the doctrines of our cases that a judgment gained in a civil suit is not admissible against the defendant in a criminal prosecution growing out of the same transaction. Britton v. State, 77 Ala. 202. Conversely, verdicts in criminal cases are not admissible in civil cases arising out of the same transactions. Carlisle v. Killebrew, 89 Ala. 329, 6 So. 756, 6 L.R.A. 617.

"In Roden and Son v. State, 30 Ala. App. 299, 3 So. 2d 420, 421, Justice Simpson stated that: 'A judgment in a civil case is not conclusive as res judicata in a criminal case, or vice versa, there being no mutuality of parties and a different degree of proof, respectively, being required.'

"In 22 C.J.S., Criminal Law, §50, the general rule, amply supported by authority, is stated as follows: '***it is generally held that a judgment or opinion in a civil action, or the record of proceedings therein, is not admissible in a subsequent criminal prosecution involving the same matter.'

> "The reasons underlying the doctrine are that the parties are not the same; the penalties are not the same; the causes of action are different; the burden of proof is not the same, in that in a civil action the defendant may be forced to testify, while he cannot be compelled to do so in a criminal proceeding."

See also *Jay v. State*, 15 Ala. App. 255, 73 So. 137 (1916).

If a judgment in a civil suit ordinarily cannot be admitted in a criminal prosecution "arising out of the same transaction," can it conceivably be said that a judgment in a civil action in Mobile can be *conclusive* in a criminal prosecution in Birmingham, when the defendant was not even a party to the prior civil action? The answer is so clear as to make a response unnecessary.

In conclusion I would summarize my views in this manner: Our system of criminal justice demands that every person charged with committing a crime be convicted only after having been afforded due process of law. Due process is not variable with the degree of repulsiveness of the crime. Murderers, rapists, kidnappers, and pornographers are entitled to the same element of the due process as embezzlers or pickpockets. These elements of due process include a jury trial on every element of the alleged crime, proof of guilt beyond a reasonable doubt and a right of confrontation. In my view, the provisions of Title 14, Section 374(4) invoked in this case deprives a defendant of all of these rights and thus msut give way to the dictates of the Constitution.

I, therefore, respectfully dissent.

Coleman, Bloodworth and Jones, J. J., concur in the foregoing dissent.

APPENDIX B

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . "

4. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

6. The pertinent provisions of Article I, §9 are:

"***No . . . ex post facto Law shall be passed.***"

7. The pertinent provisions of Title 14, Section 374, Code of Alabama are:

(a) Section 374(3):

" 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

(b) Section 374(4):

Importation, sale or possession of obscene printed or written matter; penalties.–[1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under

this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

APPENDIX

AUG 19 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-532

CHESTER McKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondant.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ALABAMA

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1974
CERTIORARI GRANTED JUNE 23, 1975

THE PAUL M. HARROD COMPANY BALTIMORE, MARYLAND 21234

INDEX

CONTENTS OF APPENDIX

	Page
Opinion	2
Organization	18
Complaint	19
Warrant of Arrest	20
Appearance Bond	21
District Attorney's Complaint	22
Demurrer	22
Motion to Quash	29
Judgment Entry	34
Given Charge	36
Refused Charges	36
Transcript of Evidence	39
Certificate of Court Reporter	46
Transcript of Evidence (Proceedings)	48
Witnesses:	
Mr. Charles H. Barnes	51
Direct Examination	52
Cross Examination	65
Redirect Examination	70

Page

Mr. D. H. Johnson 73
Direct Examination 73
Cross Examination 90
Redirect Examination 97
Mr. Charles H. Barnes (Recalled) 103
Recross Examination 104

Court's Oral Charge 116

Certificate of Court Reporter 125

Appeal Bond 126

Citation of Appeal to Court of Criminal Appeals 127

Motion for New Trial 128

Certificate of Service 136

Notice to Court of Criminal Appeal of Alabama 137

Certificate of Clerk 137

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-532

CHESTER McKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondant.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ALABAMA

APPENDIX TO APPELLANT'S BRIEF NO. 74-532

OPINIONS

THE STATE OF ALABAMA – – JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1973-74

Ex Parte: Chester McKinney

PETITION FOR WRIT OF CERTIORARI
TO COURT OF CRIMINAL APPEALS

S.C. 486

(Re: Chester McKinney
v.
State of Alabama)

FAULKNER, JUSTICE.

This is a pornography case involving the sale of a magazine entitled "New Directions" after it had been judicially found to be obscene.

"New Directions" is published in North Hollywood, California by Jaybird Enterprises, Inc. The masthead states that it is a "cultural, scientific, educational, and sociological publication produced and distributed to illuminate the conviction that the unclothed himan body is worthy of respect and deserving of increased acceptance in our culture... Subscription rates, $14.00 per year. Second-class postage paid in North Hollywood, California." A review of its pictures contained in the magazine introduced into evidence as an exhibit reveal photographs of nude men and women

exposing their genital organs in a revolting manner; male kissing female body near her genital organ; female kissing male in a like manner; females shown with their legs spread-eagle apart exposing their genital organs; male kissing the female breast; male sitting over female with his genital organ touching her mouth, and many more similar poses - the magazine contains 61 pages in all. After review of pictures of these grotesque nudes, a person of reasonable sensibilities will conclude that it is no wonder God made man and woman to wear clothes. Without them some are the most unattractive animals in His kingdom.

"New Directions" was one of a number of magazines declared to be obscene in a decree rendered by the Circuit Court of Mobile County on February 26, 1970, in an action styled, *State of Alabama, ex rel Attorney General of Alabama, ex rel District Attorney of the 13th Judicial Circuit of Alabama v. The Magazine, "Jaybird U.S.A.", No. 16, Vol. 4, No. 4; The Magazine, "New Directions", No. 14, Vol. 4, No. 4, et al.*, Case Number 76399. Each of the magazines was determined to be mailable matter and each was declared to be contraband. There appears to be a typographical error in the style of the case which refers to No. 14, Vol. 4, No. 4 of "New Directions". The decree refers to No. 16, Vol. 4, No. 4.

On March 10, 1970, a State attorney accompanied by a State investigator, went to the Paris Bookstall, Birmingham, Alabama, a place of business operated by McKinney, and personally delivered a letter to McKinney informing him that "New Directions" had been judicially declared to be obscene. On March 31, 1970, these officers returned to the Paris Bookstall and purchased the magazine, "New Directions" from McKinney. While there, and with McKinney looking on, and in the presence of the investigator, the State attorney "flipped" through the pages of the magazine. Afterwards, they left, and the investigator signed a complaint charging McKinney with violating Title 14, §374(4), Code of Alabama

1940, Recompiled 1958,[1] by selling obscene material which had been judicially declared to be obscene. McKinney was convicted in a trial before a jury and was given the maximum sentence under the statute. Before retiring, the jury was charged by the court that the only issue of fact for them to decide involved the question of selling material judicially declared obscene as charged in the complaint.

McKinney appealed his conviction to the Court of Criminal Appeals. The appellate court affirmed the trial court

---

[1] §374(4). Importation, sale or possession of obscene printed or written matter; penalties. – [1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

without rendering an opinion. Upon his application for rehearing being denied, McKinney filed a petition for certiorari, alleging deprivation of constitutional rights; that this was a case of first impression. We granted certiorari.

Neither McKinney nor the State introduced evidence in the trial on the question of obscenity, vel non. McKinney raised that issue in a motion to quash the complaint which the trial judge overruled. A motion to exclude the evidence was also overruled by the trial court. The validity of the judgment of the Mobile Circuit Court was questioned by McKinney on objection to its introduction in evidence, first in the sense that he was not a party to the action, second that the State had to prove by affirmative evidence that the subject magazine was obscene in this trial.

The action in the Mobile Circuit Court was filed pursuant to the provisions of Act No. 856, § 5 through § 11, Acts of Alabama 1961, Vol. II. The court acting as trier of fact found the magazine to be obscene. The 1961 Act defines obscene to mean "lewd, lascivious, filthy and pornographic and *that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.*" (Emphasis added.)

The Act passes the constitutional test laid down by United States Supreme Court decisions. Under *Miller v. California*, _____ U.S. _____, 93 S.Ct. 2607, 37 L.Ed2d 419, the court set out new guides to use in regulating obscene material. State offenses must be limited to works which:

1. Depict or describe sexual conduct which is specifically defined by applicable State law (as written or authoritatively construed) and

2. Taken as a whole, appeals to the prurient interest in sex and

3. Portrays sexual conduct in a patently offensive way, and

4. Taken as a whole does not have serious literary, artistic, political, or scientific value.

The guide for determining what is "patently offensive" or appeals to the "prurient interest" is to be "the average person" applying contemporary community standards. We construe "contemporary community standards" to encompass the State of Alabama. National standards are not required under *Miller*. While a trial court may empanel a jury in an advisory capacity to measure the essentially factual issues of "prurient appeal" and "patent offensiveness" by the prevailing "contemporary community standards" it is not constitutionally required. *Alexander v. Virginia*, _____ U.S. _____, 93 S.Ct. 2803, _____ L.Ed.2d _____ (1973). Furthermore, when the material itself is placed into evidence, "expert" State testimony as to its allegedly obscene nature, or other ancillary evidence of obscenity, is not constitutionally required. *Kaplan v. California*, _____ U.S. _____, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973).

Constitutional safeguards are provided in the Act for one charged with violating its provisions. Section 5 provides for the institution of proceedings for an adjudication in a Circuit Court. (While this section provides that the action shall be filed in a Court of Equity, under the Rules of Civil Procedure adopted by this court on July 3, 1973, there is now only one form of action known as a "Civil Action". Rule 2, Rules of Civil Procedure.) Section 6 of the Act provides the type of complaint to be filed and the allegations which the complaint shall contain. Section 7 provides that an order to show cause shall be issued and service of same, upon the res and the person charged. Section 8 gives the respondent the opportunity to file defensive pleadings and permits answer by amicus curiae. Section 9 provides for maximum promptness of the hearing commensurate with constitutional requirements, including due process, freedom of the press, and freedom of speech. The burden is on the State to prove obscenity, vel non, in the adjudication of same.

Section 12 provides,

> "Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this State for sale or commercial distribution, or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of Section 4 of this Act."

We now decide the question of whether the Mobile Circuit Court decree was binding on McKinney since he was not a party to the action and since obscenity, vel non, was not permitted as an issue by the trial court.

The Mobile action was in personam and in rem. The magazine, "New Directions," the subject matter in this case, was one of the res declared by the court to be obscene. The decree of the court, which was not appealed, established the status of the res, and the decree as to the status of the res was conclusive against all the world as to that status. *McCann v. Ellis*, 172 Ala. 60, 55 So. 303 (1911). See *Brennen v. Ellis*, 173 Ala. 718, 55 So. 306 (1911); *Jones v. Adler*, 183 Ala. 435, 62 So. 777 (1913). See also *Toole v. State*, 170 Ala. 41, 54 So. 195 (1911), an in rem action against 114 barrels of beer for its condemnation where the court said the status of the property was to be fixed as to all the world.

The status of the res, "New Directions" being established, and there being no change in the standards of obscenity under the statute from the time of the Mobile hearing to the trial below, no evidence of obscenity, vel non, was required in this case.

The standards under our statute were the same ante *Miller* as they were post *Miller*. We conclude that McKinney, after due notice of the decree, was subject to criminal prosecution for selling material judicially declared obscene.

We note in passing what Mr. Justice Douglas said in his dissent in *Miller*:

> "If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific."

Justice Douglas contends that until there has been a civil proceeding placing the tract beyond the pale, there should be no criminal prosecution.

AFFIRMED.

Merrill, Harwood, Maddox, and McCall, JJ., concur.

Heflin, C. J., Coleman, Bloodworth, and Jones, JJ., dissent.

HEFLIN, CHIEF JUSTICE (Dissenting):

The defendant in this case was charged with violating Title 14, Section 374(4), Alabama Code of 1940, as amended (Recompiled 1958). That section provides:

> "Every person who, with knowledge of its contents, ... sells ... or has in his possession with intent to sell ... any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the

> county, for not more than one year, and may be fined, not more than two thousand dollars for each offense. ..."

In defendant's trial before a jury, the allegedly obscene matter was entered into evidence, but the jury was charged that the only issue of fact for them to decide was whether the defendant sold material which had been judicially declared to be obscene. Thus there was no finding by the jury that the matter alleged to be obscene was obscene, and indeed no such determination could have been made under the trial court's charge.

In my opinion, the conviction of the defendant under the provisions of Section 374(4) set out above is constitutionally invalid in that the statutory procedure operates as a denial of due process of law because: (1) The defendant was denied his right to a trial by jury on a material element of an alleged offense, (2) the defendant was denied the protection of the burden of proof requirements in criminal cases, and (3) the defendant was denied his right of confrontation.

The procedure for obtaining a civil judicial determination of the obscenity of mailable matter is outlined in Sections 374(5)-374(16) of Title 14.

Without passing judgment on the constitutionality of the equity action itself, which is not here in issue, the operation of the statute can be summarized as providing the state an opportunity to have matter declared obscene and to obtain an injunction against *named respondents* prohibiting the sale or distribution of the offending matter by the *named respondents*. Section 374(12) purports to tie the injunction procedure to the punitive provisions of Section 374(4) which, in pertinent part, declares the sale or exhibition of mailable matter that has been judicially found to be obscene under Sections 374(5)-374(16) to be a misdemeanor.

While the legislature of this state has the power to declare certain acts criminal, this power is not unlimited. The state cannot punish as a crime, for example, acts which are specifically protected by the Constitution. Thus the state generally cannot make criminal the act of selling or exhibiting all books, photographs, drawings or other like matter because of the limitation imposed on the states by the First Amendment. Certain materials, however, because of their nature, have been held to lie outside the protective umbrella of the First Amendment. One class of matter which is not protected by the First Amendment is that which is said to be "obscene." Because obscene matter does lie outside the protective shield, the state's police power may be invoked to regulate such unprotected matter.

The regulation of obscene matter may take several forms, including criminal sanctions against those who traffic in it. For the criminal sanctions to be constitutionally permissible it is clear that there must be as a minimum some designated act such as a sale, exhibition, etc., of some unprotected (i.e., obscene) matter. The essential elements of the crime then are at least a (1) transaction involving (2) obscene matter. Each of these elements is a material ingredient without which there is no crime.

It is settled law that in a criminal prosectuion the state must prove every essential element beyond a reasonable doubt. E.g., *Piano v. State,* 161 Ala. 88, 49 So. 803 (1909).

Whether the trier of fact is a judge alone or a jury, the burden is the same – every material element of the crime must be proved beyond a reasonable doubt. Where the right to a jury trial attaches, the right attaches to *every* element, and not just certain elements of the crime. In the case at hand, since the possible punishment was one year in jail and a fine of up to $2,000, there is no doubt that the defendant was constitutionally entitled to a jury trial. *Baldwin v. New York*, 399, U.S., 66 (1970).

In short, the state may make it a crime for a person to sell, exhibit, etc., obscene matter, but in prosecuting the person for that crime, the state must prove to a jury every element of the çrime beyond a reasonable doubt.

Under this analysis, the infirmity of the statute becomes obvious. The state has attempted to circumvent the usual criminal process by using a civil judgment as conclusive proof of one essential element of the criminal act. (Injunctive proceedings were equitable until the new Alabama Rules of Civil Procedure went into force and effect. Now such proceedings are classified as non-jury under the merged one form of action. See Rule 2 - ARCP.)

While it is conceded that there may be some set of circumstances under which such a procedure may be permitted, it cannot be utliized to prevent a criminal defendant from full enjoyment of his constitutional rights. In the case at bar, the statute operated to deny the defendant his right to a jury trial on the most essential element for which he may be condemr.ed – i.e., the obscenity of the matter sold – and he was denied his right to the protection of the criminal burden of proof. *In re Winship,* 397 U.S. 358 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. . . ")

Furthermore, there is still another constitutional defect to the procedure. In effect, the state is attempting to statutorially engraft the principles of res judicata and collateral estoppel in a criminal prosecution. While arguably this legislative attempt could be challenged as a violation of the doctrine of separation and unconstitutional under the Alabama Constitution, Art. 3 Sec. 43, see *Broadway v. State,* 257 Ala. 414, 60 So. 2d 701 (1952) (no legislative competency to create a duty on the part of a court without exercising any discretion or judgment when a performance of that duty is an exercise of a judicial function), an even more obvious defect in the statute has been identified.

To permit the affirmative use of these concepts by the prosecution would violate another fundamental guarantee of the Bill of Rights – the right of confrontation. An excellent analysis of this problem is found in Hirsch & Ryan, I Know It When I Seize It: Selected Problems in Obscenity, *4 Loyola U. L. Rev.* 9, 76-81 (1971). In the author's hypothetical situation the assumption is made that the state convicts *A* in X County for selling obscene matter. Since the threshold issue in *A*'s case was the obscenity of the matter, *A*'s conviction operates as a judicial determination of the obscenity of the matter. The authors' analysis continues:

> "Subsequently, the People undertake prosecution of defendant B in Y county, or any number of defendants in numerous counties, concerning the identical material. The threshold issue is again the obscene nature of the identical material. The People may attempt to raise the prior adjudication on this element as the subsequent action(s) concerns the identical issue; there is a final adjudication on the merits by a court of competent jurisdiction; and the party against whom the adjudication is raised, the material, was a party to the prior adjudication. . . .
>
> * * * * * * *
>
> "Were these concepts operative in a vacuum of pure theory, independent of other considerations, the foregoing would seem to permit the prosecution's utilization of these concepts in subsequent proceedings. However, to permit such affirmative use of the concepts by the prosecution would affront one of the fundamental guarantees of the Bill of Rights – the right of confrontation.
>
> "This guarantee was held applicable to the states in Pointer v. Texas [380 U.S. 400 (1965)]. Under the instant facts, the People, through utilization of the prior in rem judgment of obscenity would, if

> permitted, supply the sine qua non of the in personam criminal proceedings merely by pleading that judgment and interposing the plea of collateral estoppel in answer to any defense attempt to litigate the issue of obscenity. The ultimate effect of such application would be to confront the defense with the core of the prosecutor's case, in documentary form with no provision for cross-examination or confrontation. Such procedures were early condemned indeed, were deemed of primary importance in the enactment of the Sixth Amendment.
>
> "In relation to the concept of collateral estoppel, in a criminal proceeding, courts have been quite reluctant to allow its application in a manner adverse to the defendant. This reluctance is admirably presented in what may be considered the two leading cases in the field. United States v. Carlisi [32 F. Supp. 479 (E.D.N.Y. 1940)] stated the principle to be:
>
> > In transplanting the doctrine . . . to criminal law . . . [a] prior adjudication with respect to an element of a subsquently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt.
>
> United States v. De Angelo [138 F. 2d 486 (3d Cir. 1943)] emphatically restated the foregoing:
>
> > An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto. *While the foregoing decisions considered the applicability of the concept in the realm of a*

> *subsequent prosecution of the defendant in a prior action, the rationale precluding application if negative to the defendant is even more compelling in proceedings directed against an individual not an actual party to a prior proceeding, the results of which compel him to defend an in personam criminal proceeding."* (emphasis added) (Footnote omitted)

Furthermore, the case law of this state has long recognized the constitutional invalidity of using a previous civil action as res judicata in a subsequent criminal prosecution. In *Helms v. State*, 35 Ala. App. 187, 45 So. 2d 170 (1950) Judge (now Justice Harwood summarized this state's law:

> "[I]t is clearly settled by the doctrines of our cases that a judgment gained in a civil suit is not admissible against the defendant in a criminal prosecution growing out of the same transaction. Britton v. State, 77 Ala. 202. Conversely, verdicts in criminal cases are not admissible in civil cases arising out of the same transactions. Carlisle v. Killebrew, 89 Ala. 329, 6 So. 756, 6 L.R.A. 617.
>
> "In Roden and Son v. State, 30 Ala. App. 299, 3 So. 2d 420, 421, Justice Simpson stated that: 'A judgment in a civil case is not conclusive as res judicata in a criminal case, or vice versa, there being no mutuality of parties and a different degree of proof, respectively being required.'
>
> "In 22 C.J.S., Criminal Law, §50, the general rule, amply supported by authority, is stated as follows: '* * * it is generally held that a judgment or opinion in a civil action, or the record of proceedings therein, is not admissible in a subsequent criminal prosecution involving the same matter.'

> "The reasons underlying the doctrine are that the parties are not the same; the penalties are not the same; the causes of action are different; the burden of proof is not the same; the rules of procedure are not the same, in that in a civil action the defendant may be forced to testify, while he cannot be compelled to do so in a criminal proceeding."

See also *Jay v. State*, 15 Ala. App. 255, 73 So. 137 (1916).

If a judgment in a civil suit ordinarily cannot be admitted in a criminal prosecution "arising out of the same transaction," can it conceivably be said that a judgment in a civil action in Mobile can be *conclusive* in a criminal prosecution in Birmingham, when the defendant was not even a party to the prior civil action? The answer is so clear as to make a response unnecessary.

In conclusion I would summarize my views in this manner: Our system of criminal justice demands that every person charged with committing a crime be convicted only after having been afforded due process of law. Due process is not variable with the degree of repulsiveness of the crime. Murderers, rapists, kidnappers, and pornographers are entitled to the same element of the due process as embezzlers or pickpockets. These elements of due process include a jury trial on every element of the alleged crime, proof of guilt beyond a reasonable doubt and a right of confrontation. In my view, the provisions of Title 14, Section 374(4) invoked in this case deprives a defendant of all of these rights and thus must give way to the dictates of the Constitution.

I, therefore, respectfully dissent.

Coleman, Bloodworth and Jones, JJ., concur in the foregoing dissent.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct

copy of the instrument(s) (illegible) set out as same appears of record in said Court.

Witness my hand this 9 day of May, 1974

/s/ J. O. SENTELL,
Clerk, Supreme Court of
Alabama

SC 486

EX PARTE: CHESTER MCKINNEY

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(RE: CHESTER MCKINNEY V. STATE)

WHEREAS, on August 27, 1973, a writ of certiorari to the Court of Criminal Appeals was granted and this cause was set down for submission pursuant to Supreme Court Rule 39.

WHEREUPON, come the parties and the cause being argued and submitted and duly examined and understood by the Court, it is considered that in the decision of the Court of Criminal Appeals there is no error.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the judgment of the Court of Criminal Appeals be in all things affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the petitioner, Chester McKinney, pay the costs of this proceeding for which costs let execution issue.

JUNE 6, 1974

SC 486

EX PARTE: CHESTER MCKINNEY

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(RE: CHESTER MCKINNEY V. STATE)

IT IS ORDERED that the application for rehearing filed in this cause on May 24, 1974, be, and the same is hereby, overruled.

THE STATE OF ALABAMA)

COUNTY OF MONTGOMERY)

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages 1 through 17 contain a full, true, and correct copy of the Opinion, Judgment and Order overruling the application for rehearing in the cause of SC 486, Ex Parte: Chester McKinney, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS, (Re: Chester McKinney v. State of Alabama) as the same appears of record and remains on file in this Court.

WITNESS my hand and the Seal of the Court attached at the Judicial Department Building in the City of Montgomery, Alabama, this the 5th day of August, 1975.

/s/ J. O. SENTELL, (SEAL)
Clerk of Supreme Court of
Alabama

Circuit Court No. 20948

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

SIXTH DIVISION

CHESTER McKINNEY

v.

STATE OF ALABAMA

APPEALED FROM THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

APPEARANCES:

MR. JOHN DeCARLO, Deputy District Attorney, Jefferson County Courthouse, Birmingham, Alabama, for the State.

MR. FERRIS RITCHEY, JR., Attorney-at-Law, 825 Frank Nelson Building, Birmingham, Alabama and

MR. ROBERT E. SMITH, Attorney-at-Law, Alex Brown & Sons Building, 102 W. Penn. Ave., Towson, Md. 21204, for the Defendant-Appellant.

HONORABLE WALLACE GIBSON, Judge Presiding.

AT A REGULAR, ADJOURNED OR SPECIAL SESSION OF THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, AT WHICH THE OFFICERS AUTHORIZED BY LAW TO HOLD OR SERVE SUCH COURT WERE SERVING, THE FOLLOWING PROCEEDINGS WERE HAD IN THE CAUSE STYLED: No. 20948, THE STATE VS. CHESTER McKINNEY, TO-WIT:

COMPLAINT

THE STATE OF ALABAMA
JEFFERSON COUNTY

IN THE CRIMINAL COURT OF JEFFERSON COUNTY

Personally appeared before the undersigned as Ex-Officio Judge of the Criminal Court of Jefferson County, in and for said County D. H. Johnson who being duly sworn, says that Chester McKinney whose name is otherwise unknown to affiant, within twelve months before making this affidavit in said County, with knowledge of its contents did exhibit, sell, and have in his possession with intent to sell, obscene printed or written material said material known by him to have been judicially found to be obscene under the provisions of Alabama Law to-wit: a magazine entitled "New Directions" Number 16, Volume 4, Number 4 in violation of the Code of Alabama 1940-1958 recompiled Title 14, Section 374 (4) Pocket Part against the peace and dignity of the State of Alabama.

Subscribed and sworn to before me this

31 day of March, 1970.

D. H. Johnson (sig)

T. S. Wiles
Ex-Officio Judge of the Criminal Court of Jefferson County

A. 20

WARRANT OF ARREST

THE STATE OF ALABAMA

JEFFERSON COUNTY

To Any Lawful Officer of Said County, GREETING:

You are hereby commanded to arrest Chester McKinney and bring him before the Judge of the Criminal Court of Jefferson County, at the present term of said Court, to answer the State of Alabama of a charge of Importation, Sale or Possession of Obscene Printed or Written Matter Code of Ala. 1940-1958 Recompiled Tit. 14, Sec. 374 (4) P.P. preferred by D. H. Johnson.

Witness my hand this 31 day of March, 1970.

T. S. Wiles (sig)
Ex-Officio Judge of the Criminal
Court of Jefferson County

The officer arresting, may admit the defendant to bail upon him entering into bond in the sum of $300.00 dollars with two good securities approved by said officer.

T. S. Wiles (sig)
Ex-Officio Judge Criminal
Court of Jefferson County

Defendant lives Paris Book Stall

MAR 31 4:15 PM '70 Rec'd Sheriffs Dept. Jeff. Co.

Executed by arresting the within named defendant and the said defendant committed to county jail, March 31, 1970. Melvin Bailey, Sheriff. By H. H. Brooks, Deputy Sheriff.

COMMITTED TO JAIL - MAR 31, 1970. Melvin Bailey, Sheriff.

MAR 31 4:22 PM '70.

FILED IN OFFICE
APR 20, 1970.

A. 21

APPEARANCE BOND

THE STATE OF ALABAMA
JEFFERSON COUNTY

We Chester McKinney Principal, and George Ritchey, Salem E. Ritchey and Edna Ritchey by Feris Ritchey, Jr., Atty in Fact sureties, agree to pay to the State of Alabama Two Thousand and no/100——Dollars, unless the said Chester McKinney appear at the present term of the Circuit Court of Jefferson County, and from term to term thereafter until discharged by law, to answer a criminal prosecution for the offense of Importation, Sale or Possession of Obscene Material and we hereby waive the benefit of all laws exempting property from levy and sale under execution or other process for the collection of debt, by the Constitution and Laws of the State of Alabama, and we hereby severally certify that we have property over and above all debts and liabilities to the amount of the above bond.

PRISONER SIGN TOP LINE	NAME ADDRESS
Chester McKinney	(L.S.) 1401 Montclair Rd
	By
George E. Ritchey	(L.S.) Feris Ritchey, Jr.
Salem E. Ritchey	(L.S.) Atty-in-Fact
Edna Ritchey	(L.S.) 825 Frank Nelson Bldg. 252-2191

Approved this 15 day of April, 1970.

Burgin Hawkins (sig)

Judge

By _____

Filed in Office - APR 20, 1970

DISTRICT ATTORNEY'S COMPLAINT

THE STATE OF ALABAMA

JEFFERSON COUNTY

THE CIRCUIT COURT OF TENTH JUDICIAL CIRCUIT

Present Term, 1970

On Appeal from Jefferson County Criminal Court.

The State of Alabama, by its Solicitor, complains of Chester McKinney That, within twelve months before the commencement of this prosecution, Chester McKinney did with knowledge of its contents, exhibit, sell and have in his possession with intent to sell obscene printed or written material; said material known by him to have been judicially found to be obscene under the provisions of Alabama law, to wit; a magazine entitled "New Directions Number 16 Volume 4 Number 4", in violation of the Code of Alabama 1940 as recompiled in 1958, Title 14, Section 374 (4) pocket part, against the peace and dignity of the State of Alabama.

Earl C. Morgan (sig)
Solicitor

FILED IN OPEN COURT

NOV 9, 1970

DEMURRER

TO THE HONORABLE WALLACE GIBSON, JUDGE OF SAID COURT:

Comes now the Defendant, Chester McKinney, in the above styled cause, by and through his attorney, and

respectfully demurs to the solicitor's complaint as a whole and for grounds of demurrer sets down and assigns the following separately and severally:

1. Said complaint does not set out sufficient facts to apprise the Defendant of what it is he is called upon to defend.

2. For aught that appears, the provisions of Title 14, Chapter 64-A Pocket Part of the Code of Alabama, 1940, as recompiled in 1958, employs a constitutionally deficient definition of obscenity and is void for overbreadth and vagueness as written and/or as applied to Defendant.

3. For that the solicitor's complaint fails to state in what manner the alleged obscene material was judicially found to be obscene.

4. For that the solicitor's complaint fails to state when the alleged obscene material was judicially found to be obscene.

5. For that the solicitor's complaint fails to state where the alleged obscene material was judicially found to be obscene.

6. For that the solicitor's complaint fails to state by whom the alleged obscene material was judicially found to be obscene.

7. For that the solicitor's complaint is fatally defective for failure to charge therein, a date certain on which the alleged offense was committed, and to whom the Defendant was allegedly to have sold the publication alleged to be obscene.

8. For that the solicitor's complaint fails to set out the provisions of Alabama law under which the alleged obscene material could be judicially found to be obscene.

9. For that the averment in solicitor's complaint that the Defendant, Chester McKinney, did with knowledge of its content, exhibit, sell, and have in his possession with intent to sell, obscene printed or written material, is merely a conclusion of the solicitor.

10. For that the solicitor's complaint fails to aver that the magazine entitled "New Directions Number 16 Volume 4 Number 4" has been judicially found to be obscene.

11. For that the solicitor's complaint denies the Defendant the protection of the provisions of the Sixth Amendment to the Constitution of the United States, wherein it is provided that as a constitutional guarantee, an accused has at minimum, the right "to be informed of the nature and cause of the accusation" against him.

12. For that the solicitor's complaint is fatally defective for failure to charge therein the essential element of scienter, i.e. knowing the character and content of the publications to be obscene.

13. For aught that appears, the statutory provisions of Title 14, Chapter 64-A, Pocket Part, of the Code of Alabama, as recompiled in 1958, are as written repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the Constitution of the United States because:

a. Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the Constitution of the United States; and further,

b. Said statutory provisions are void for overbreadth by means which sweeps unnecessarily broadly and thereby invade

the area of protected freedoms in that the statute sets forth standards for determining and regulating obscenity at variance with and insufficient for those minimum standards prescribed by the United States Suprme Court in connection with publications presumptively protected under the *First* and *Fourteenth* Amendments; and further,

c. The said statutory provisions are void for vagueness and impermissibly overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the federal constitutional rights of citizens of the State of Alabama and the United States, as well as Defendant, to publish, distribute, circulate, sell, receive and/or purchase printed publications; and further

d. Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth* Amendments to the United States Constitution because they permit deprivation of liberty and/or property interests for the exercise of First Amendment rights by unreasonable, arbitrary, and capricious means by law enforcement officials of the State of Alabama without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms; and further,

e. Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further,

f. Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, Fifth* and

Fourteenth Amendments to the *Constitution of the United States* in that said statutory provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Defendant's *First Amendment* rights by law enforcement officials of the State of Alabama; and further,

g. Said statutory provisions are void for impermissible overbreadth and repugnant to the Constitution as aforesaid in that the determination of obscenity *vel non* is a question of law and not a question of fact as provided in said statute.

14. For that the solicitor's complaint does not charge Defendant with knowledge of the obscene character of the material alleged to have been sold by him and as such, in dealing in the area of the exercise of Defendant's *First* and *Fourteenth Amendment* rights, the failure to charge scienter is repugnant to the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States.*

15. For aught that appears, the publication "New Directions Number 16 Volume 4 Number 4" is not obscene in the constitutional sense as a matter of law and is protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

16. For aught that appears, there is no reasonable or probable cause to believe that the publication "New Directions Number 16 Volume 4 Number 4" is obscene in the constitutional sense as a matter of law under the *First* and *Fourteenth Amendments* to the *Constitution of the United States* in that:

a. The solicitor's complaint fails to allege that the publications involved herein exceed the limits of candor tolerated in the national community as a whole in the representation or depiction of matters pertaining to sex and/or nudity.

b. The solicitor's complaint fails to allege that the publication involved herein appeals to the prurient interest of the average intended recipient considered as a whole.

c. The solicitor's complaint fails to allege that the publication charged herein was "utterly without social value".

d. The solicitor's complaint fails to reflect a specific and limited concern for juveniles.

e. The solicitor's complaint fails to allege that the publication involved herein is hard core pornography.

f. The solicitor's complaint fails to allege that the Defendant is guilty of the sort of pandering proscribed by the Supreme Court of the United States in *Ginzburg v. U. S., 363 U.S. 304* (1966).

g. The solicitor's complaint fails to allege that the Defendant sold the publication involved in a manner to make it impossible for an unwilling individual to avoid exposure to the publication.

17. That the District Attorney for the Tenth Judicial Circuit of Alabama, by his agents, servants, employees and attorneys, has instituted a criminal proceeding in the Circuit Court of the Tenth Judicial Circuit, through a solicitor's complaint, without first obtaining and affording Defendant herein a judicially superintended adversary proceeding prior to arrest on the question of obscenity *vel non*. The procedures thus employed are clearly constitutionally deficient in the area of the exercise of *First Amendment* rights by Defendant for lack of a prior judicial adversary determination of the obscenity of the material.

18. For that the solicitor's complaint does not allege that the Defendant herein was afforded a judicially superintended adversary proceeding prior to his arrest on the question of

obscenity vel non, thereby clearly denying Defendant his *First Amendment* rights for lack of a prior judicial adversary determination of the obscenity of the material.

19. For that the solicitor's complaint does not charge a date certain on which the offense by Defendant was allegedly committed and is thus constitutionally defective.

20. For that the solicitor's complaint does not allege to whom it was that the Defendant is supposed to have sold the alleged obscene materials.

Ferris S. Ritchey, Jr. (sig)
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Demurrer has been personally delivered to John DeCarlo, Esquire, Assistant District Attorney for the Tenth Judicial Circuit of Alabama, this 10th day of November, 1970.

Ferris S. Ritchey, Jr. (sig)
Of Counsel

11-10-70-Demurrer overruled and defendant excepts. Gibson, Judge.

FILED IN OPEN COURT

NOV. 10, 1970.

MOTION TO QUASH

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Comes now Defendant, Chester McKinney, by and through his attorneys, and moves to quash the Solicitor's Complaint filed in this cause on the 9th day of November, 1970, charging in essence violation of the obscenity laws, and for grounds hereof states:

I.

The statutory provisions of *Title 14, Chapter 64-A* pocket part of the *Code of Alabama*, as recompiled in 1958, are as written repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* because:

a) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States*; and further

b) Said statutory provisions are void for overbreach by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards for determining and regulating obscenity at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in connection with publications presumptively protected under the *First* and *Fourteenth Amendments*; and further

c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are

susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the federal constitutional rights of citizens of the State of Alabama and the United States, as well as Defendant, to publish, distribute, circulate, sell, receive and/or purchase printed publications; and further,

d) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the *United States Constitution* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by law enforcement officials of the State of Alabama without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms: and

3) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further,

f) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* in that said statutory provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Defendant's *First Amendment* rights by law enforcement officials of the State of Alabama; and further,

g) Said statutory provisions are void for impermissible overbreadth and repugnant to the Constitution as aforesaid in that the determination of obscenity *vel non* is a question of law and not a question of fact as provided in said statute.

II.

The solicitor's complaint does not charge Defendant with knowledge of the obscene character of the material alleged to have been sold by him and as such, in dealing in the area of the exercise of Defendant's *First* and *Fourteenth Amendment* rights, the failure to charge scienter is repugnant to the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States*.

III.

The "New Directions Number 16 Volume 4 Number 4" is not obscene in the constitutional sense as a matter of law and is protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

IV.

There is no reasonable or probable cause to believe that the publication, "New Directions Number 16 Volume 4 Number 4" charged in the Solicitor's Complaint, is obscene in the constitutional sense as a matter of law under the *First* and *Fourteenth Amendments* to the *Constitution of the United States* in that:

a) There is no allegation in the Solicitor's Complaint that the publication involved herein exceeds the limits of candor tolerated in the national community as a whole in the representation or depiction of matters pertaining to sex and/or nudity.

b) There is no allegation in the Solicitor's Complaint that the publication involved herein appeals to the prurient interest of the average intended recipient considered as a whole.

c) There is no allegation in the Solicitor's Complaint as would show the publication charged herein was "utterly without social value."

d) The Solicitor's Complaint does not reflect a specific and limited concern for juveniles.

e) There is no allegation in the Solicitor's Complaint that the publication charged herein is hard core pornography.

f) There is no allegation in the Solicitor's Complaint that the Defendant was guilty of the sort of pandering proscribed by the Supreme Court of the United States in *Ginzburg v. U.S., 363 U.S. 304* (1966).

g) There is no allegation in the Solicitor's Complaint that the Defendant was guilty of publishing or selling in a manner so obtrusive as to be an assault upon individual privacy in a manner to make it impossible for an unwilling individual to avoid exposure to the publication involved.

V.

That the District Attorney for the Tenth Judicial Circuit of Alabama, by his agents, servants, employees and attorneys, has instituted a criminal proceeding in the Circuit Court of the Tenth Judicial Circuit, by his filing a Solicitor's Complaint, without first obtaining and affording Defendant herein a judicially superintended adversary proceeding prior to arrest on the question of obscenity *vel non*. The procedures thus employed are clearly constitutionlly deficient in the area of the exercise of First Amendment rights by Defendant for lack of a prior judicial adversary determination of the obscenity of the material.

VI.

That the Solicitor's Complaint does not charge a date certain on which the offense by Defendant was allegedly committed and is thus constitutionally defective.

VII.

That the Solicitor's Complaint does not allege to whom it was that the Defendant is supposed to have sold the alleged obscene material.

WHEREFORE, Defendant prays that the Solicitor's Complaint be quashed.

Respectfully submitted,

Ferris S. Ritchey, Jr. (sig)
825 Frank Nelson Building
Birmingham, Alabama 35203
252-2191

Of Counsel:

Ferris S. Ritchey, Jr. (sig)
Robert Eugene Smith
102 W. Pennsylvania Avenue, Suite 507
Towson, Maryland 21204
Area Code 301-821-6868

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Quash has been personally delivered to John DeCarlo, Esquire, Assistant District Attorney for the Tenth Judicial Circuit of Alabama, this 10th day of November, 1970.

Ferris S. Ritchey, Jr. (sig)
Of Counsel

11-10-70-Motion overruled and defendant excepts. Gibson, Judge.

FILED IN OPEN COURT
NOV 10, 1970

JUDGMENT ENTRY

THE STATE

VS.

CHESTER MCKINNEY

Affidavit for Possession, Sale or Importation
of Obscene Printed or Written Matter
Appealed from Jefferson County Criminal Court

Honorable Wallace Gibson, Judge Presiding

This 9th day of November, 1970, came Earl C. Morgan, District Attorney, who prosecutes for the State of Alabama, and also came defendant in his own proper person and by Attorney Ferris Ritchey, Jr., and the State files its Complaint and thereupon came a jury of good and lawful persons, to-wit: Frederick H. Josey and eleven others, who being duly empaneled and sworn according to Law, before whom the trial of this cause was entered upon and continued from day to day and time to time, said defendant being in open Court at each and every stage and during all the proceedings in this cause. This 10th day of November, 1970, defendant files demurrer to the Complaint and said demurrer being duly considered by the Court, it is ordered by the Court that said demurrer be and the same is hereby overruled, to which action of the Court, the defendant hereby duly and legally excepts. The defendant files motion to quash complaint and said motion being duly considered by the Court, it is ordered by the Court that said motion be and the same is hereby overruled, to which action of the Court, the defendant hereby duly and legally excepts. The defendant hereby enters his plea of not guilty to the Complaint filed herein. This 10th day of November, 1970, said jurors upon their oaths do say "We the jury find the defendant guilty as charged in the complaint and assess a fine of $2000.00".

This 11th day of November, 1970, the defendant being now in open Court, and being asked by the Court if he had anything to say why the judgment of the Court and sentence of the law should not now be pronounced upon him, says "No Sir". It is therefore considered by the Court, and it is the judgment of the Court that defendant is guilty as charged in the complaint, in accordance with the verdict of the jury in this cause, and that he pay a fine of Two Thousand Dollars ($2,000.00) and costs of this cause.

The defendant being in open Court and having failed to pay said fine and costs or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court and it is ordered and adjudged by the Court and it is the sentence of the Law that the defendant, Chester McKinney, perform hard labor for Jefferson County for 515 days, because of his failure to pay said fine and costs or to confess judgment with good and sufficient security for the same.

It is further considered by the Court and it is ordered and adjudged by the Court and it is the sentence of the Law that the defendant perform an additional term of hard labor for Jefferson County for a term of 12 months as additional punishment.

The costs legally taxable against the defendant in this cause amounting to $84.00 not being presently paid or secured and $26.50 of said amount being State Trial Tax $3.00, Law Library Tax $1.00, Fair Trial Tax $1.00, Inferior Court fees $21.50, leaving $57.50 taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for 19 days, at the rate of $3.00 per day to pay said costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This 11th day of November, 1970, Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Criminal Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Criminal Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $2000.00, conditioned as required by Law.

GIVEN CHARGE

The following charge was requested by the defendant, in the presence of the jury and before the jury retired, and was given by the Court, said charge being in writing, and being endorsed separately and severally, "Given, W. Gibson, Circuit Judge", and being in words and figures as follows, to-wit:

1.

The Court charges you, ladies and gentlemen of the jury, that if, upon considering all the evidence, you have a reasonable doubt about the guilt of the Defendant, arising out of any part of the evidence, you must find the Defendant not guilty.

11-10-70-Given, W. Gibson, Circuit Judge.

REFUSED CHARGES

The following charges were requested by the defendant, in the presence of the jury and before the jury retired, and

were refused by the Court, said charges being in writing, and being endorsed separately and severally "Refused, Gibson, J.", and being in words and figures as follows, to-wit:

2.

I charge you, ladies and gentlemen of the jury, that the Prosecution must introduce evidence of community standards, either that the alleged obscene material appealled to prurient interests or offended contemporary standards of decency, and that if the Prosecution failed to introduce any evidence of community standards, you cannot find the Defendant guilty.

11-10-70-Refused, Gibson, J. Circuit Judge.

3.

I charge you, ladies and gentlemen of the jury, that you do not have the prerogative of imposing your own personal standards as the test of criminality of conduct, and that you do not necessarily express or reflect community standards, and that proof of community standards is a necessary prerequisite to conviction of this Defendant.

11-10-70-Refused, Gibson, J.

4.

The Court charges the jury that unless the Prosecution introduced evidence that according to or applying contemporary community standards, the dominant theme of the magazine in question appealled to the prurient interests of the reader, or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters, you cannot find this Defendant guilty.

11-10-70-Refused, Gibson, J.

5.

The Court charges the jury that unless the Prosecution has introduced evidence to prove that the magazine, "New Directions Number 16, Volume 4 Number 4" to be utterly without redeeming social value, you cannot find this Defendant guilty.

11-10-70-Refused, Gibson, J.

6.

The Court charges the jury that a guilty verdict in an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. The determination of obscenity by this jury cannot be on the basis of your personal upbringing or restricted reflection of the particular experience of life, but on the basis of "contemporary community standards which must be established by relevant evidence during the trial". The Court charges the jury that unless these standards have been so established by relevant evidence during the trial, you cannot find this Defendant guilty.

11-10-70-Refused, Gibson, J.

7.

The Court charges the jury that since the Prosecution in the present case had the burden of proving relevant community standards prevailing in the nation generally and elected not to do so, you cannot find this Defendant guilty.

11-10-70-Refused, Gibson, J.

8.

The Court charges the jury that if you believe from the evidence that the magazine entitled "New Directions Number

16 Volume 4 Number 4" was sold to willing adults in an adults only environment, i.e., "adults only bookstore" and are not pandered or foisted upon an individual wishing to avoid confrontation with it and not disseminated to juveniles, you cannot find this Defendant guilty.

11-10-70-Refused, Gibson, J.

TRANSCRIPT OF EVIDENCE

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

IN AND FOR JEFFERSON COUNTY, ALABAMA

CRIMINAL DIVISION

CASE NO. 20948,

STATE OF ALABAMA.....PLAINTIFF

Vs.

CHESTER McKINNEY.....DEFENDANT

CAPTION

THE ABOVE-STYLED CAUSE came on to be heard before the Honorable Wallace C. Gibson, judge presiding, in open court on motion of the defendant, commencing on the 9th day of November, 1970, at 1:27 P.M., when the following proceedings were had and done:

APPEARANCES

MR. CHARLES H. BARNES, assistant attorney general, State Capitol, Montgomery, Alabama, and Mr. JOHN DeCARLO, assistant district attorney, Jefferson County Courthouse, Birmingham, Alabama, for the State.

MR. FERRIS S. RITCHEY, JR., Suite 825, Frank Nelson Building, Birmingham, Alabama, for the defendant-movant.

* * * * *

Reported by

J. L. Narkates

* * * * *

(T. 2) **PROCEEDINGS**

(The Court) Go ahead and make your motion for the record before we bring them up.

(Mr. Ritchey) Your Honor, I would like, at this time, to move for a continuance of Case No. 20948, and, as grounds in support of my motion, I state that the chief counsel in this case is Robert Eugene Smith, an attorney from Towson, Maryland, and that my function as attorney in this case and in all matters involving this defendant – of which there have been some twenty-five or thirty – has always been merely as a courier, and I have introduced Mr. Smith in this court for him to practice in this court; that my employment with Mr. Smith has been with that understanding from the very beginning, and prior to this time I have not had to actively participate in a case involving Mr. McKinney, either with the City, County, or State.

Mr. Smith was advised by me by letter and by telephone that these matters were set this week, that the court docket would be sounded today, Monday, November 9th, and, so far as I know, he knew that this matter would be tried today.

I was informed by his office earlier this morning that he was on his way to Birmingham, or should be in Birmingham.

I was further informed by his office this afternoon that he is in court in Baltimore and is supposed to appear before the Supreme Court of the United States tomorrow morning, which is Tuesday.

I have had telephone conversations in an attempt to find out why he is not here, because I can say that (T. 3) prior to this time he has always informed me if he could not be here, so that I could seek a continuance before the case is sent out to Your Honor, or any of the judges.

For that reason, I request a continuance at this time.

(The Court) Before I rule on this matter and as part of my ruling, to further clarify the record, of course, Mr. Ferris Ritchey, Jr., who is here representing the defendant today, and who is a member of our local bar, appears as attorney of record for this defendant.

This case was appealed here to the circuit court for a jury trial from the County Criminal Court, here, on what appears to be April 15th of this year, that is, 1970.

It was docketed in this court on April 27, 1970.

It was passed from time to time. It was passed from May 22nd to June 18th, from June 18th to – I don't know; I am obviously wrong; I can't read that – something, the 10th –

(Mr. Ritchey) September, I believe.

(The Court) It looks like October 19, 1970.

(Mr. Ritchey) 19th.

(The Court) Then, on the 19th of October it was passed until today, at the request of the defendant, with the consent of the State.

Now, it is my understanding that the attorney, Mr. Smith, whom Mr. Ritchey speaks of in his motion, is a member of the Maryland Bar, and that he practices law there and he was employed, also, in this case.

As I understand it, Mr. Ritchey, you did handle this case on preliminary, is that correct?

(T. 4) (Mr. Ritchey) Yes, sir.

(The Court) Due to the fact that this case was sounded this morning by one of the other judges, Judge Jasper, here in the circuit court, that it was announced ready and marked ready and sent to this court for trial, the motion for continuance is hereby overruled.

(Mr. Ritchey) May I add this –

(The Court) Yes, sir.

(Mr. Ritchey) This case involves some constitutional law questions that need to be raised, that perhaps can be raised if the defendant should be found guilty, on appeal, but they do involve some constitutional law questions that it was my understanding that Mr. Smith would raise when he came here.

I have not, because of my reliance upon his being here – had any such motions involving constitutional law questions prepared to present to Your Honor.

I do not feel, because of the nature of this case, that I am qualified to defend the defendant, and, for that reason, I request that I be permitted to withdraw as his attorney.

(The Court) Overrule.

(Mr. Ritchey) Thank you, sir, with an exception.

(The Court) Yes, sir. All right, let's bring the jury up.

(Thereupon, ensued an off-the-record discussion, following which proceedings were in abeyance, following which there was another off-the-record discussion, following which the following proceedings were had and done:)

(T. 5) (Mr. Ritchey) As further grounds of continuance, I have just been served with a complaint.

Your Honor, I have just been handed a copy of a solicitor's complaint and wish to renew my request for a continuance in this matter on the grounds that this is the first time that I have been handed the solicitor's complaint, setting out exactly what the charge is against Chester McKinney, on trial in this court; that this has been handed to me approximately three or four minutes prior to the time that a jury venire will come into the courtroom for us to select the jury that is to try this case.

I haven't had time to study the solicitor's complaint sufficiently to determine whether or not it has been properly drawn, whether or not a motion to quash would be in order, based upon the law which is peculiar to this type of offense, and, primarily, because of the – that this particular cause of action against Chester McKinney – this particular cause arises out of a law that was passed by the Alabama Legislature within the past year, on which there is no established law concerning the new law passed by the Legislature.

(The Court) Let me say this before I rule: Of course, this complaint follows the original affidavit on which this case was tried in the court below. It states the same charge, in virtually the same language.

The Court advised you earlier that if you wanted to attack this complaint, you may do so in any manner you wanted to at that time.

As a matter of fact, I suggested to you that (T. 6) you might think about a demurrer and that sort of attack to it.

The way you put that motion in the record may look like I am shooting you on the ground, when I am not.

I have been trying to give you every opportunity to file any sort of pleading you want to.

(Mr. Ritchey) Your Honor, in the lower court – although this is a case de novo – in the lower court there was no such document, as such. You make a bond and you appear before the court. I don't recall anything similar to a solicitor's complaint being handed to me or being filed or given to us in the lower court.

(The Court) Ferris, I have the record of the lower court. This is '948, that is, this complaint.

The affidavit in the court below was executed down there and became part of the record in that court on March 31, 1970, and, according to the transcript of what occurred in that court down there, this case was tried down there on April 15, 1970, which was some two weeks after this complaint was filed.

This complaint was – this affidavit of complaint was filed down there, the case was tried on this complaint, and it is part of the record of that court.

You, as an attorney, had as much access to it as anyone else could. It was tried on this piece of paper in my right hand (indicating).

It was brought in the circuit court and made part of the record up here. It was microfilmed on April 27, 1970, and, actually, the appeal was taken on April 15, 1970.

(T. 7) This has been on file and part of the records in this court, and, as an attorney, I am amazed when you say there wasn't any paper – that it was tried on no complaint.

(Mr. Ritchey) I didn't say that.

(The Court) If you didn't look at it, you were remiss as an attorney. It is part of your job.

This was and at all times has been on file.

(Mr. Ritchey) I made the statement that I wasn't served with any similar type of complaint, nor was my client, in the lower court.

(The Court) You don't tell us that you didn't know what the charges were down there and that you didn't know this affidavit of complaint was on record for your convenience, as well as the State?

(Mr. Ritchey) What I am merely stated, neither me nor my client was served with a solicitor's complaint.

(The Court) I wanted to be sure that was true.

I understood you to be saying that I was taking you by surprise.

(Mr. Ritchey) No, sir.

(The Court) And you didn't have opportunity to know what you are defending here.

If I am wrong, forgive me.

You are going to go ahead and file a demurrer, aren't you?

(Mr. Ritchey) Yes, sir.

(Thereupon, proceedings were in abeyance, following which there was an off-the-record discussion, which concluded the (T. 8) hearing of this motion on this cause.)

(THE FOREGOING CONCLUDED THE HEARING ON THIS MOTION)

(T. 9) **CERTIFICATE**

STATE OF ALABAMA

JEFFERSON COUNTY

I, J. L. Narkates, do hereby certify that I reported in shorthand the proceedings in the above-styled cause at the time and place stated in the caption hereof, that I later reduced my shorthand notes to typewriting, or under my supervision, and the foregoing pages, beginning with the word "Proceedings," where the same appears in the center of the page, following the style of the case, the caption, and the appearances, contain a true, correct, and complete transcript of the proceedings as therein set out.

I further certify that no exhibits were offered or received in evidence in the hearing of the above-styled cause.

I further certify that I have, on this day, notified counsel of the filing of this transcript in the office of the Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama.

This 23rd day of March, 1971.

J. L. Narkates (sig)
Official Court Reporter

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

IN AND FOR JEFFERSON COUNTY, ALABAMA

CRIMINAL DIVISION

Case No. 20948

STATE OF ALABAMA ..... PLAINTIFF

Vs.

CHESTER McKINNEY ..... DEFENDANT

CAPTION

THE ABOVE-STYLED CAUSE came on to be heard before the Honorable Wallace C. Gibson, judge presiding, and a jury, commencing on the 9th day of November, 1970, at 3:23 P.M., when the following proceedings were had and done:

APPEARANCES

MR. CHARLES H. BARNES, assistant attorney general, State Capitol, Montgomery, Alabama, and MR. JOHN DeCARLO, ASSISTANT DISTRICT ATTORNEY, Jefferson County Courthouse, Birmingham, Alabama, for the State.

MR. FERRIS S. RITCHEY, JR., Suite 825, Frank Nelson Building, Birmingham, Alabama, for the defendant.

* * * * *

Reported by

J. L. Narkates

* * * * *

(T. 2) **PROCEEDINGS**

(Thereupon, a jury venire was brought in, qualified, identified, and special questions asked by counsel on both sides, there being no objections made nor exceptions reserved. A jury was then struck and duly sworn, following which the following proceedings were had and done:)

(The Court) Ladies and gentlemen, this case which we are starting to try now is what is known in our law as a misdemeanor, and the law doesn't require that I keep the jury together at night and at lunchtime during the course of the trial.

I want to say this to you: I don't want you – I know you don't know anything about this case yet, but I don't want you to let anyone talk to you about it, or to let anyone talk about it in your presence, or hearing.

I know that certain questions have been asked you about the Paris Bookstall.

Don't go to try to find out anything about it, because anything you need to know about this case you are supposed to get from the witness stand, and if you try to get information about the thing it would have a very serious effect on the trial of this case, because we are confined in the trial of the case to only that which comes to us from the witness stand and the law as given to you by the Court, and if you try to talk to someone else about it, either about some fact in the case, or about some person involved in the case, it would have (T. 3) a very serious effect on the trial. Anyway, it would be presumed by the law – it might be presumed that, possibly, a fair trial was interfered with.

I am going into this detail because you are going to be separated and permitted to go home.

If you know where such a place as the Paris Bookstall is, don't go by there, and don't talk about this case with anybody, or any phase or feature of it.

I am going to adjourn this case until 9:30 in the morning.

On Mondays, Tuesdays, and Wednesdays, we have docket calls in this court. It is most difficult to get everyone here, because some attorney, or some D.A. has got a case that they have to make their peace with the judge, and I find that we can get as much done on Monday, Tuesday, and Wednesday by recessing until 9:30 as we can by adjourning until 9:00.

This is Room 613, and my name is Wallace Gibson. That last door back there (indicating) is our jury room. When you come in in the morning, go back there, and I will ask all of you to come out and have seats at the same time.

Okay, good night to you, and we will see you in the morning, ladies and gentlemen.

(Thereupon, proceedings were in recess from 4:30 p.m. until 9:46 a.m., the following day, at which time, out of the presence and hearing of the jury, the following proceedings were had and done:)

(T. 4)
NOVEMBER 10, 1970 9:46 A.M.

PROCEEDINGS RECONVENED PURSUANT TO ADJOURNMENT

(Mr. Ritchey) May I at this time, Your Honor, make this –

(The Court) Go ahead.

(Mr. Ritchey) Your Honor, at this time I would like to renew my motion for a continuance at the request of Robert

Eugene Smith, who is the defendant's attorney from Baltimore.

I talked with Mr. Smith late yesterday afternoon and found out why he was not present in court on Monday, and learned that he did know that this matter was set down for trial this week, but he was not aware it was going to be tried on Monday, that he had a matter before the Supreme Court of the United States, about which they informed him eight days ago, Docket 58, October Session, 1970, style of the case "United States of America versus Book Bend."

He is arguing this case in the United States Supreme Court this morning.

He is requesting a twenty-four hour continuance, until tomorrow morning, at which time he said he could be present and participate in this trial.

He also requested that I state to Your Honor that Mr. McKinney, under the Sixth Amendment to the Constitution, has a right to select his own attorney, and that he is Mr. McKinney's attorney.

As I stated to Your Honor previously, I was employed by Mr. Smith, and not by Mr. McKinney, to assist Mr. Smith in whatever endeavors he might ask me (T. 5) to do while he was trying this case, and, with this information, I again renew my request for a continuance of twenty-four hours in this case.

(The Court) Overrule.

(Mr. Ritchey) We except.

(The Court) Let's put the jury in the box.

(Thereupon, the jury was brought into the courtroom at 9:48 a.m., when, in the presence and hearing of the jury, the following proceedings were had and done:)

(The Court) All right, be seated, gentlemen. Good morning, ladies and gentlemen.

Do we have other witnesses? Are there other witnesses out there?

(Mr. DeCarlo) Judge, we have one other witness, Mr. Johnson.

(The Court) I am going to invoke the Rule. I might as well instruct him.

(Thereupon, the Rule was invoked, following which the following proceedings were had and done:)

(The Court) All right, go ahead, proceed.

(Thereupon, Mr. DeCarlo addressed the jury, in opening statement, on behalf of the State, there being no objections made nor exceptions reserved. Following Mr. DeCarlo, Mr. Ritchey addressed the jury, on behalf of the defendant, there being no ob-(T. 6) jections made nor exceptions reserved. The following proceedings were then had and done:)

EVIDENCE ON BEHALF OF THE STATE

(The Court) All right, who will you have first?

(Mr. DeCarlo) If the Court please, Mr. Barnes.

(The Court) All right, come around, Mr. Barnes, please, sir.

MR. CHARLES H. BARNES

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. DeCarlo) For the record, please, sir, would you state your name? A. Charles H. Barnes.

Q. And where do you live, Mr. Barnes? A. Montgomery.

Q. And by whom are you employed, Mr. Barnes? A. The Attorney General of Alabama.

Q. As – in what capacity, please, sir? A. I am an assistant attorney general.

Q. And, as assistant attorney general, you are a lawyer, are you not? A. That is correct.

Q. And you are licensed to practice law in the State of Alabama, and its courts? A. Yes, sir.

Q. Back in March of this year, were you working for the attorney general in the capacity you told the (T. 7) jury? A. Yes, sir.

Q. Back in March of this year, did you have occasion – first of all, let me ask you: Do you know where the Paris Bookstall is located, generally? A. The Paris Bookstall is located on Fifth Avenue, in downtown Birmingham, just a few blocks from this courthouse.

Q. That is, Birmingham, Jefferson County, Alabama; the Paris Bookstall is located in this county, Birmingham, Jefferson County, Alabama, is that right, sir? A. Yes, sir.

Q. And back in March of this year, did you have occasion to go to the Paris Bookstall? A. Yes, sir, I did. One time, on March 10th.

Q. Did you go there more than one time? A. Yes, sir. I have been to Paris Bookstall several times.

Q. In March of this year, how many times did you go in the month of March? A. Two times.

Q. Do you know the dates that you went there in March? A. Yes. The first time was on March 10th. The second time was on March 31st.

Q. All right, sir. And at the time you went there on March 10th, did you go there alone? A. No. I had the investigator for the attorney general's department, Mr. D. H. Johnson, with me.

(T. 8) Q. And this is Doc Johnson that was just in here a few minutes ago? A. Yes, sir.

Q. At the time you went there on March 10th, did you see Mr. McKinney? A. Yes, I did.

Q. And is Mr. McKinney in the courtroom now? A. Yes, he is.

Q. Would you point him out, please, sir? A. That is Chester McKinney, right there (indicating).

Q. When you went to the Paris Boodstall, on May 10th, did you talk with him? A. Yes, sir.

Q. And at the time you talked to him, what did you do at the time you were talking to him, if anything? A. I identified myself to Chester McKinney and served him with notice that several magazines and publications had been judicially declared obscene in various state courts in Alabama.

(Mr. Ritchey) I object to the reply of the witness that he served him with notice, unless he proves what the notice was and how it was obtained.

The best evidence rule.

(The Court) Of course, I will overrule. You certainly – I would expect the State to further go into it, and, also, on cross examination, how he went about doing these things.

It calls for a conclusion, but I will overrule the objection.

(T. 9) Go ahead, John.

(Mr. DeCarlo) May I get this marked for identification, please, sir?

(Thereupon, a written instrument was received by the court reporter and marked, "State's Exhibit A, for identification.")

(Mr. Ritchey) May I see it?

(Mr. DeCarlo) Yes, sir (handing the written instrument to Mr. Ritchey).

Q. Now, Mr. Barnes, I believe you said that you gave Mr. McKinney, notice, is that right? A. I served Mr. McKinney a letter stating that certain books had been judicially declared obscene.

Q. Did you compose the letter, yourself? A. Yes, I did.

Q. And this notice, after compiling it, did you sign the notice? A. Yes, I did.

Q. Mr. Barnes, I show you State's Exhibit A, marked for identification, and I will ask you to look at that, please, sir (handing written instrument to the witness).

All right, sir. Would you look at the second page, please, sir (indicating)? A. All right.

Q. Is that your signature, Mr. Barnes? A. Yes, it is.

Q. All right, sir. Is this (indicating) the notice that you served on Mr. McKinney on March 10th? A. This is a carbon copy of the notice that I (T. 10) served on Mr. McKinney.

Q. Did you actually, physically, give him a copy of the notice you have in your hand now? A. Yes.

Q. Did he take that notice, sir? A. Yes, he did.

(Mr. DeCarlo) Judge, at this time, we would like to offer this, please, sir.

(Mr. Ritchey) I object to it, Your Honor, the notice. There is no evidence to show that this was a legal notice, that this notice was properly given.

I think it is a bit premature, introducing the notice, until there has been a basis laid for the notice, itself.

It is a conclusion of Mr. Barnes that he had the right to give him this notice.

There is nothing to indicate he had a right to give this notice, under what authority he gave this notice.

(Mr. DeCarlo) I will be glad to ask Mr. Barnes.

(The Court) Let me see it, (receiving written instrument).

Let me ask you this, gentlemen, before we go too much further:

Is there any attempt been made to locate or account for the original?

I understand that the general objection, among others, have been assigned to the introduction of this copy of the notice.

(Mr. DeCarlo) No, sir.

(T. 11) (The Court) Did you leave the original with the defendant? A. Yes, sir, I did.

(The Court) Have you seen it since? A. Are you speaking to me?

(The Court) Yes, sir. A. No, sir, I haven't seen it, since I put it in Mr. McKinney's hand.

(The Court) Ferris, do you have the original in your file?

(Mr. Ritchey) I have never seen it, Your Honor.

(The Court) Would you find out right now –

(Mr. Ritchey) The only thing I have is a copy that Mr. Barnes sent me.

(The Court) Would you find out if the defendant has the original, where it is available to the Court?

(Thereupon, ensued an off-the-record discussion between counsel for defendant and the defendant, following which the following proceedings were had and done:)

(Mr. Ritchey) The defendant remembered that he was, at one time, handed something by Mr. Barnes, but he doesn't have that specific remembrance that it was this letter he is talking about.

(The Court) I am going to find out if this original is available.

If it isn't available, then, of course, in my opinion, the copy would be admissible, but if the original is available, it would be the best evidence.

(Mr. Ritchey) That is one of the objections, (T. 12) Your Honor, but a primary objection I have –

(The Court) I understand that. You have already made it.

Let's don't get back in it.

(Thereupon, ensued an off-the-record discussion between counsel for defendant and the defendant, following which the following proceedings were had and done:)

(Mr. Ritchey) Your Honor, there is about nine different magazines listed in this letter, and he says that he didn't specifically remember this letter.

He does remember receiving a letter.

(The Court) Is this letter available to the Court, here, now?

(Mr. Ritchey) No, sir, it isn't available to the Court.

(The Court) John, would you step – would you get me Title 14 out, Volume 5? I believe it is on the corner of my desk. Excuse me (receiving book). Go ahead, gentlemen. Let's see, you were about to offer it, or had offered it, and there was an objection to it.

(Mr. DeCarlo) Yes, sir, I do offer it.

(The Court) Let me see. I want to find out one thing.

(Thereupon, proceedings were in abeyance, following which the following proceedings were had and done:)

(T. 13) (The Court) John, you speak of "pursuant to 64 A., in Title 14."

Is this – I don't know whether this is the means taken in an attempt to comply. What I am hunting, is whether there is a requirement for a specific notice.

(Mr. DeCarlo) Judge, may I ask Mr. Barnes about – he has that particular section that the Court is inquiring about.

(The Court) What is it, Mr. Barnes? A. I believe the last paragraph of that notice concerns itself with the fact that this notice is given in compliance with Chapter 64 A. That is a 1969 obscene statute that applies.

(The Court) I am aware that the State traveled under the last section of this 374 sub 4.

I don't know whether to look for a chapter which says such a written notice should be given, or not, spelled out in that language.

(The Witness) The '69 statute requires that notice be given before prosecution is commenced.

(The Court) Is that the last one? Is that what I have got in the 1969 pocket part?

(The Witness) Your Honor, I am not sure.

(Mr. Ritchey) We take issue with his interpretation of what that statute says.

(The Court) What I am trying to find out is if the statute specifically says that, or whether or not that is someone else's interpretation.

If it isn't spelled out, there is no need for me looking for it.

I could have read the whole thing. I guess (T. 14) that would save time by me doing it.

Okay, just a minute, I will read it all.

(Thereupon, proceedings were in abeyance, following which the following proceedings were had and done:)

(Mr. Ritchey) Your Honor, what you want to look for is section 4 A. I think this is what Mr. Barnes has relied upon, although we give a different interpretation.

(The Court) Section 374

(Mr. Ritchey) 374, Section 4A.

(The Court) What do you mean, "Section 4A"?

(Thereupon, ensued an off-the-record discussion, following which the following proceedings were had and done:)

(The Court) Yes, sir, this is not in the pocket part. This is not in the 1969 pocket part.

I couldn't find the "A." This is obviously not brought forward in this 1969 Cumulative pocket part.

Now, let's see. Yes, sir, that is exactly what I was talking about.

All right, thank you. That answers my question.

You see, when these things go to press you don't necessarily have the last thing, even though they are called the 1969 Cumulative Pocket Part.

All right, gentlemen, proceed.

(Mr. DeCarlo) Judge, I believe at the time – if the Court please, I would like to make – I would (T. 15) like to offer this notice into evidence again, Judge.

(The Court) Mr. Barnes, is it your statement that this is an exact copy, and that the original was served on the defendant on the occasion you spoke of? A. Yes, sir.

(Mr. Ritchey) Your Honor, I would again repeat the same objection, and, on the further objection that no predicate has been laid for the introduction of this notice.

This notice is a notice that Mr. Barnes says that he served, and there was no basis for the notice shown in the evidence as of this time, and we object to it.

(The Court) Overrule.

(Mr. Ritchey) We except.

(The Court) It is admitted in evidence.

(Thereupon, the said written instrument was received in evidence and re-marked by the court reporter as, "State's Exhibit A." The said written instrument is set out in words and figures below as follows:)

STATE'S EXHIBIT A

"March 10, 1970

Mr. Chester McKinney
Manager and Operator
Paris Bookstall
Birmingham, Alabama

You are hereby given notice that the following (T. 16) books, magazines, and publications have been judicially found to be obscene under the provisions of Chapter 64A, Title 14, Code of Alabama 1940 (Recompiled 1958), by decree of the Circuit Court of Mobile County, Alabama, In Equity, Joseph M. Hocklander, Judge, on the dates and case numbers hereinafter indicated below:

JAYBIRD U.S.A., No. 16, Vol. 4, No. 4, Case No. 76398, decided February 26, 1970.

NEW DIRECTIONS, No. 16, Vol. 4, No. 4, Case No. 76399, decided February 26, 1970.

NUDISM TODAY, No. 35, Vol. 6, Case No. 76401, decided February 26, 1970.

JAYBIRD JOURNAL, Vol. 5, No. 2, Case No. 76397, decided February 26, 1970.

NUDE FIGURE, Vol. 1, No. 1, Case No. 76402, decided February 26, 1970.

DAHLINGS, Case No. 76404, decided February 26, 1970.

SKIN GAME, No. 2, Case No. 76403, decided February 26, 1970.

SEXCOPE, 1970 Calendar, Case No. 76405, decided February 26, 1970.

NUDE REVOLUTION, No. 1, Case No. 76400, decided February 26, 1970.

This notice given pursuant to the provisions (T. 17) of Chapter 64A, Title 14, Code of Alabama 1940 (Recompiled 1958), and Act No. 698, Regular Session, Alabama Legislature 1969, adopted September 11, 1969.

MacDONALD GALLION,
Attorney General

By
/s/ Charles H. Barnes
CHARLES H. BARNES
Assistant Attorney General

CHB:srs"

(END OF EXHIBIT)

(Mr. Ritchey) Your Honor, may I offer one other ground?

(The Court) Yes, sir.

(Mr. Ritchey) One other ground for the objection, that the section, or act, that you just finished reading, referring to prior written notice, that we state for the defense that the – a careful reading of that section would show that this is not the type notice that has been received into evidence.

For that reason, we object to it.

(The Court) Overrule.

Q. Mr. Barnes, I believe you said that you had gone to the Paris Bookstall on two occasions in the month of March of this year? A. Yes, sir.

Q. All right. Do you remember the date?

(The Court) Excuse me just a minute, John. Let me see that (indicating). There is one thing that (T. 18) occurred to me. Go ahead.

(Mr. DeCarlo) All right, Judge.

Q. I believe you said that you had gone there twice in the month of March of this year? A. Yes, sir.

Q. Do you remember the date which you went there the second time in March? A. On March 31st.

Q. Did you go there alone? A. No, sir.

Q. And who accompanied you on that occasion? A. Attorney General Investigator D. H. Johnson.

Q. Doc Johnson? A. Yes, sir.

Q. At the time you went there on the second occasion, did you see Mr. McKinney at that time? A. Yes, sir.

Q. And were you and Mr. Johnson together at that time? A. Yes, sir.

Q. Were you all together, inside the building, or the place of business, itself? A. We were together at all times when we were in the store.

Q. Now, at that time did Mr. Johnson purchase a magazine? A. Yes, he did.

Q. Did he do that in your presence? A. At my instructions and orders, yes, sir.

Q. And he did purchase a book? (T. 19) A. Yes, sir.

Q. And do you know, of your own knowledge, the name of that book, or magazine, that he purchased? A. Yes, sir.

Q. And what is that name, please, sir? A. "New Directions."

Q. Were you with him at the time he made the selection of this particular book? A. Yes, sir. Actually, I selected the book, myself.

Q. All right, sir. And where was the book, or the magazine – we have been saying "book." This is, in fact, a magazine, is that right? A. That is correct.

Q. Where was the magazine located with respect to where the store is? A. It was on a series of racks made to hold magazines.

They are all over the walls of the store. This was one of them. The book was on one wall, in a magazine rack.

Q. Was this magazine wrapped in any fashion? A. This magazine had a transparent cellophane cover on it.

Q. A Clear cover? A. Yes, sir.

Q. And, after selecting this magazine, what did you and Mr. Johnson do, if anything, with the magazine? A. I took the magazine up to Chester McKinney.

I personally took the cellophane cover off the magazine and slowly turned the pages of the magazine (T. 20) in front of Mr. McKinney, showing him what he had.

Q. And did Mr. McKinney look as you flipped through the magazine? A. Yes, sir.

(The Court) You selected the book. Mr. Johnson purchased it from someone, and then you got it from Mr. Johnson and took it up and showed it to Mr. McKinney? A. No, sir. The book was selected, and I took the magazine at that time and ripped the cover off and flipped through the pages, showing them to Mr. McKinney, and then a purchase was made after that, sir.

Q. The magazine was purchased from whom, please, sir? A. Chester McKinney.

Q. And it was purchased by whom from Mr. McKinney? A. The actual money transaction was made by Doc Johnson and Mr. McKinney.

Q. This was done in your presence? A. And on my orders.

Q. At the time that Mr. Johnson purchased the magazine, did he receive anything after purchasing the magazine? A. A receipt was given him.

Q. You were saying you had flipped through the magazine in Mr. McKinney's presence.

This was done in Mr. Doc Johnson's presence, also? A. Yes, sir.

Q. And I believe you said that Mr. McKinney looked at the magazine as you flipped through it? A. Yes, sir.

(T. 21) Q. All right, sir. Now, after purchasing the magazine, what did you do, if anything, after that? A. We walked out.

Q. All right, sir. Now –

(Thereupon, ensued an off-the-record discussion, following which the following proceedings were had and done:)

(Mr. DeCarlo) I have no further questions at this time. Answer Mr. Ritchey's questions.

(The Witness) All right.

CROSS EXAMINATION

Q. (By Mr. Ritchey) Mr. Barnes, –

(Mr. Ritchey) Your Honor, I have no questions at this time.

(The Court) Wait just a minute.

(Mr. Ritchey) I reserve the right to cross examine this witness if the State puts on any more testimony.

(The Court) Mr. Barnes, I notice that this alleges that this magazine was entitled "New Directions," No. 16, Volume 4, No. 4? A. Yes, sir.

(The Court) And you testified that you bought a "New Directions," without any further identification. Do you have further identification, other than that this is a magazine called "New Directions"? A. Yes, sir. The magazine was a "New Directions," No. 16, Volume 4, No. 4.

(The Court) No. 4? (T. 22) A. Yes, sir.

(The Court) You say you saw the purchase? A. Yes, sir.

(The Court) Did you see the money change hands? A. Yes, sir.

(The Court) Did Mr. Johnson give the defendant any money? A. Yes, sir, he did.

(The Court) Is there anything else?

(Mr. Ritchey) Let me question him about a few things, then, Judge.

(The Court) All right.

Q. (By Mr. Ritchey) Mr. Barnes, the Paris Bookstall, I believe you said, is located on Fifth Avenue, in this city? A. Yes, sir.

Q. Will you describe, generally, to the jury the outside appearance of the business establishment there? A. Yes, sir. There's a neon, or flashing, light, that says, I believe "Paris Bookstall."

There is a shape of a woman. I am not sure if there is a sign there. Looking at the store, it might be glass, or something. It is painted. I think it says, "Adult Bookstore."

Q. There are signs on the outside and inside of the store, that says, "For Adults Only," is there not? A. Yes, sir.

Q. Is there not a sign on the front door that says, "No One Under 21 Admitted," or "No One Under 18 Admitted"?

(T. 23) (Mr. DeCarlo) I object to that, Your Honor.

(The Court) I think the entire physical layout that is there – I am going to let him go into that. I am not going behind the book, itself, because I understand that this prosecution is based on the sale of something that is alleged to have been judicially determined to be obscene under this section of the Code.

As to the physical layout, I will let him go into that.

(Mr. DeCarlo) All right.

Q. Now, the outside of the store, I think you said, had an "Adult Only" both in front and on the inside, is that right? A. There are some "Adult Only" signs. I am not sure where they are.

There might very well be some on the outside.

Q. Do you recall whether or not there were any on the inside? A. Well, I do remember some signs, not exactly as to where they were.

Q. I will ask you if it isn't a fact that the – that there are two windows on both sides of a glass door?

I am speaking now of the outside physical appearance there.

Is it not a fact that all these windows have been painted black? A. They are opaque. I don't know the color, but you can't see through them.

Q. You can't see through them? A. No, sir.

Q. A person standing outside cannot see through (T. 24) the store? A. That's right.

Q. Either through the windows, or through the door? A. Yes.

Q. Unless the door is open, is that right? A. Yes.

Q. Did you go to this Paris Bookstall voluntarily, in your capacity as an assistant attorney general? A. I don't understand what you mean by "voluntarily."

Q. But Mr. McKinney, or any of his employees, were not standing on the outside of the store, and beckoning you to come in? A. No, sir.

Q. You opened the door, and you went in of your own free will, is that correct? A. Yes, sir.

Q. Did you see Mr. McKinney, or any employee of the Paris Bookstall, standing on the outside, attempting to entice customers in the store? A. No, sir.

Q. Did you see any pages, or copies of material of magazines which are shown in the Paris Bookstall displayed on the outside that would attract your attention to it? A. No, sir.

Q. In other words, the only way that you would know what was being sold inside the Paris Bookstall would be for you to go into the Paris Bookstall, is that not true? A. Yes, sir.

(T. 25) Q. Did you see any juveniles, or minors, in the store while you were there?

(Mr. DeCarlo) I object to that, Your Honor.

(The Court) Sustain the objection.

(Mr. Ritchey) I ask Your Honor to note that the Supreme Court of the United States sets out three violations that must be required to uphold an obscenity offense, and these are the three I am going over, and it would appear that I can't question him on whether or not they were juveniles there, or it invaded his privacy.

(Mr. DeCarlo) I object to that.

(The Court) I sustained the objection for this reason, that there is no evidence – if there is no evidence that there was juveniles there, it wouldn't be required to show that there was one there.

So, I am going to sustain the objection.

Q. Now, the magazine that you mentioned, that you said you picked up, you said it had a cellophane wrapper around it? A. Yes, sir.

Q. Is it not true that that wrapper prevented you from looking through the magazine without taking off the wrapper? A. Yes, sir.

Q. The only matter concerning that magazine that would be exposed to the eye would be the front and back cover, is that correct? A. That is correct.

Q. Is it not true that most of the magazines of this nature, that are sold at the Paris Bookstall, – that they were wrapped in cellophane wrappers? (T. 26) A. Most of them I saw were wrapped in this transparent cellophane.

Q. In other words, they couldn't have been picked up and thumbed through? A. Most of them did have this covering.

Q. Now, Mr. Barnes, you said the letter, which has been introduced as State's Exhibit 1, was prepared by you, is that right? A. Yes, sir.

Q. Under no one else's instructions? A. I am not quite sure I know –

Q. You prepared it? A. I work under a supervisor.

Q. But did you prepare this under his instructions, or under your own initiative? A. I had received general instructions to pursue the matter.

Q. I am not asking you about general instructions. I am asking you if this specific letter was drawn by you under your own initiative and handed by you to Mr. McKinney on your own initiative? A. Under general instructions to handle this matter.

Q. And you prepared the letter, I believe? A. Yes, I prepared the letter.

(Mr. Ritchey) Your Honor, I would limit my cross examination of the witness at this time based on the evidence now, – testimony now in evidence, with leave to cross examine him further if any further evidence is presented by the State.

(The Court) All right, you may do that.

(T. 27) **REDIRECT EXAMINATION**

Q. (By Mr. DeCarlo) Mr. Barnes, Mr. Ritchey asked you about signs on the outside, and you said that there were some signs on the inside and some of them may have said, "Adults Only."

Would you describe any other signs you saw, if you remember any? A. I saw a number of signs, whole racks and pictures showing private parts of males and females, whole racks of books –

(Mr. Ritchey) I object to that as not responsive to the question. He asked if any signs were in there.

(The Court) I am going to sustain the objection.

Q. Let me ask you this, Mr. Barnes: Did you see any other signs in there?

You said there were some other signs in there? A. There were signs advertising films, I believe, for rent, or sale.

Q. Would you describe what else you saw in there, other than signs and magazines?

(Mr. Ritchey) I object, Your Honor. The defendant here is charged with selling "New Directions," and that's all he is charged with.

(The Court) The defense did go into the physical outlay down there, but I think we are getting pretty far afield.

I am going to sustain the objection. Later, if anything comes out to make the other signs admissible, then we will go back to it at that time.

(T. 28) But, as it stands now, I am going to sustain the objection.

Q. All right. Now, I believe Mr. Ritchey asked you whether or not you had gone there to the Paris Bookstall voluntarily?

I will ask you, Mr. Barnes, who directed you to go to the Paris Bookstall.

(Mr. Ritchey) I object, Your Honor. He stated he went there voluntarily.

He has already answered the question.

(The Court) I am going to overrule the objection – sustain the objection to going into that.

Mr. Barnes, as assistant attorney general, you were given the assignment of halting this matter, is that right? A. The assignment of doing something about pornography in Alabama.

(Mr. Ritchey) I move to exclude that statement as being prejudicial and move for a mistrial.

(The Court) Overrule the objection.

(Mr. Ritchey) We except.

(The Court) To this general assignment, as assistant attorney general, no one spelled out specific instructions on how to go about this in a one, two, three fashion, other than to give you an overall assignment, and, pursuant to that overall assignment, you did proceed to go to that place and give him this letter?

Is that correct? A. That is correct.

(The Court) With that, I will sustain the objection to the question.

(T. 29) Q. Let me ask you this, Mr. Barnes, I believe Mr. Ritchey asked you the question concerning the magazines being wrapped in such a fasion with cellophane that they could not be opened readily.

Were there other magazines there that you could open and see on the inside of the magazine? A. Most of the magazines that I remember were actually wrapped with this transparent cellophane.

(Mr. DeCarlo) All right. I have no further questions at this time.

(The Court) All right, thank you, Mr. Barnes.

(WITNESS EXCUSED)

(Mr. DeCarlo) Mr. Johnson, please, sir.

(The Court) Mr. Johnson.

MR. D. H. JOHNSON

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. DeCarlo) Would you state your name, please, sir? A. D. H. Johnson.

Q. Where do you live, Mr. Johnson? A. 13 East Patton, Montgomery, Alabama.

Q. And you are employed by whom, please, sir? A. The Alabama Attorney General.

Q. As what? A. As an investigator.

Q. Were you employed as an investigator by the Attorney General's office in March of this year? (T. 30) A. Yes, sir.

Q. Did you have occasion, in March of this year, to go to the Paris Bookstall? A. Yes, sir, I did.

Q. Do you know where it is located, generally? A. Yes, sir.

Q. And where is that, please, sir? A. I can go there from here. I think it's on Fifth Avenue, in that vicinity.

(The Court) Are you familiar enough with Birmingham to know whether it would be North, or South? A. Yes, sir. It would be South, I think – no, First Avenue –

(The Court) I was merely authenticating his record.

Is there any question? Would it be agreed, without wasting a lot of time, that it is Fifth Avenue, North, and not South?

(Mr. Ritchey) Yes, sir.

(The Witness) I'm sorry.

Q. Mr. Johnson, do you know how many times you went to the Paris Bookstall in March of this year? A. Well, three occasions, twice in one day.

Q. Do you have knowledge of how many – I mean, what dates you went there in March, please, sir? A. I believe one was March 10th and one was March 31st, or thereabouts.

Q. The times you went there on March 10th, did you go there alone? A. No, I did not.

Q. All right, sir, and who accompanied you to the (T. 31) Paris Bookstall on March 10th, please, sir? A. Mr. Charles Barnes.

Q. And at the time you went there on March 10th, with Mr. Barnes, did you see Mr. McKinney? A. Yes, sir.

Q. Did you all have occasion to talk with Mr. McKinney? A. Yes, sir.

Q. All right, and did Mr. Barnes speak with Mr. McKinney? A. Yes, sir.

Q. Where did Mr. Barnes – well, were Mr. Barnes and Mr. McKinney in your presence at all times while you were in the Paris Bookstall? A. We were in the store together.

Q. On March 10th, were you in the immediate vicinity at all times, to where you could see what the other was

doing, or was not doing, at all times? A. There was one time I think I went back to what was known as the film room.

They could have had a conversation that I didn't hear.

Q. Were you present when Mr. Barnes handed Mr. McKinney something? A. Yes, sir, I was.

Q. Do you know what he handed Mr. McKinney? A. A list of books, that had been judicially declared obscene.

(Mr. Ritchey) I object to that. That is a conclusion of the witness. There has been no predicate laid for proving these books,–

(T. 32) (The Court) Did you see him hand him the letter? A. Yes, sir.

(The Court) Did the letter state that they had been judicially declared obscene? A. I am not sure, Judge, if the letter said that, or not.

(Mr. DeCarlo) Judge, may I show him at this time?

(The Court) Yes, sir. Overrule at this time.

(Mr. Ritchey) We except.

Q. Mr. Johnson, I show you State's Exhibit A, that is in evidence now (indicating).

I will ask you to look at that, please, sir (handing written instrument to the witness). A. All right.

Q. Do you recognize that? A. Yes, sir.

Q. And do you recognize this as the letter that was given to Mr. McKinney on March 10th? A. Yes, sir.

Q. All right. And I believe you said that this was a notice of the books –

(Mr. Ritchey) Your Honor –

(The Court) I sustain.

(Mr. Ritchey) Move to exclude.

Q. After handing Mr. McKinney the notice, what did you do, or what did Mr. Barnes do then? A. We purchased some books.

Q. All right. Let me ask you this:

After you made the purchase, you left, is that right? (T. 33) A. Yes, sir, shortly thereafter.

Q. Now, I believe you said you went back on March 31st, is that right? A. Yes, sir, to the best of my knowledge it was March 31st.

Q. At that time, did you go there alone at that time? A. No, sir.

Q. All right. Who was with you at that time? A. Mr. Barnes.

Q. All right, and what did you do, or what did you and Mr. Barnes do, if you did anything together, when you went there on that occasion? A. We purchased additional books.

Q. All right. Now, did you make a purchase of a magazine there? A. Yes, sir.

(Mr. DeCarlo) All right, sir. Let me get this marked for identification.

(Thereupon, an instrument was received by the court reporter and marked, "State's Exhibit B, for identification.")

Q. Mr. Johnson, I believe you said you purchased some more books? A. That is correct, yes, sir.

Q. And at the time –

(Mr. Ritchey) I would rather the jury didn't see it.

(The Court) Is this the magazine that has already been testified about?

(T. 34) (Mr. DeCarlo) Yes, sir. I want it, to show it to Mr. Ritchey, and that is what I was trying to do.

(The Court) That is correct. Gentlemen, let me say this. We try to have a recess approximately every hour for everyone's comfort and convenience, and, of course, the court reporter has to write down everything said, and we find out, as the trial progresses, that about once every hour is what is required to take care of him, also.

So, we will be in recess for a few minutes, and you all may go back there to the jury room for a few minutes and be comfortable.

We will go into this while they are gone.

(Thereupon, the jury left the courtroom at 10:41 a.m., when, out of the presence and hearing of the jury, the following proceedings were had and done:)

(The Court) Let's see what that magazine is. Let's find out in the absence of the jury (receiving instrument marked, "State's Exhibit B, for identification).

(Mr. Barnes) The volume number is on the inside cover.

(Mr. DeCarlo) Mr. Johnson, I think you stated that you bought a number of books of this kind, is that right? A. Yes, sir.

(Mr. DeCarlo) Let me ask you this: Did you buy books, or magazines? A. Magazines.

(T. 35) (Mr. DeCarlo) All right. Now, how many magazines did you buy, please, sir, if you know? A. I don't recall. I think it was three, with at least two copies of each.

(Mr. DeCarlo) All right. Now, the magazines that you purchased, after purchasing them, did you make any sort of identifying marks on the inside, your mark, or anything? A. Yes, sir.

(Mr. DeCarlo) I show you this magazine (indicating), and I will ask you to look through it, and, then, I want to ask you something about it, please, sir.

(Thereupon, the witness observed the instrument, following which the following proceedings were had and done:)

(Mr. DeCarlo) All right. Did you purchase this magazine? A. I did, yes, sir.

(Mr. DeCarlo) And I will ask you to look – is this your initial, here (indicating)? A. They are.

(Mr. DeCarlo) And this shows – what is the date it shows it was purchased, here (indicating)? A. The 31st of March, 1970.

(Mr. DeCarlo) And this (indicating)? A. 11:20 a.m.

(Mr. DeCarlo) And who did you purchase this from? A. The defendant, Mr. McKinney.

Q. And, at the time you purchased it, was Mr. (T. 36) Barnes there with you? A. Yes, he was.

(Mr. DeCarlo) All right. And, after purchasing the magazine, what did Mr. Barnes do with the magazine, if anything? A. What did he do with the magazine?

(Mr. DeCarlo) Yes, sir. Did you keep the magazine in your possession, or did you give it to Mr. Barnes, or what did Mr. Barnes do with it, if anything? A. The magazines were put in a paper bag by Mr. McKinney, and then we left. Then the magazines were given to Mr. Barnes.

(Mr. DeCarlo) Did you pay Mr. McKinney for the magazines? A. Yes, sir.

(Mr. DeCarlo) And you paid him in United States currency, of course? A. Yes.

(Mr. DeCarlo) Did you receive a receipt? A. Yes.

(Mr. DeCarlo) I will ask you –

Mark this, please.

(Thereupon, a written instrument was received by the court reporter and marked, "State's Exhibit C, for identification.")

(Mr. DeCarlo) Did you receive a receipt? A. Yes.

(Mr. DeCarlo) I show you State's Exhibit C, marked for identification, and I will ask you to look at that, please, sir, (handing written instrument to (T. 37) the witness). A. All right.

(Mr. DeCarlo) All right. Is that a receipt that you received on this occasion? A. Yes, it is.

(Mr. DeCarlo) And from whom did you receive that receipt from, please, sir? A. From the defendant, Mr. McKinney.

(Mr. DeCarlo) Did he write the receipt in your presence? A. Yes, he did.

(Mr. DeCarlo) Did he sign the receipt in your presence? A. Yes, sir, he did.

(Mr. DeCarlo) And what was the amount for the magazines? A. $10.07.

(Mr. DeCarlo) And what were the three – first of all, was one of the magazines purchased "New Directions, no. 16"? A. Yes, sir.

(Mr. DeCarlo) All right. Judge, I have – Your Honor, I didn't want to offer it in the jury's absence, because they may wonder what happened, but I wanted to go into this thing without our exhibiting things until we knew what they were.

It is pretty hard to tell a jury, "Don't remember what you saw."

(Mr. Ritchey) I assume that you are going to introduce it in evidence?

(Mr. DeCarlo) Yes, sir.

(T. 38) (Mr. Ritchey) I want to object to it, and I suppose we should make our objection now.

(The Court) I think you should. You had better later, also.

(Mr. Ritchey) I object on the grounds that, although we have disagreed with the procedure followed by the State in

bringing this complaint, and they are charging that there is a judicial determination that this magazine is obscene, once you prove that – and you saw the proof they gave, the notice that the law requires – and once they prove the magazine was purchased, then there is no need in introducing the magazine.

The only purpose to introduce the magazine, itself, would be to enflame, and the Supreme Court says that the court and jury, themselves, are not sufficient to arrive at the question – let me put it this way: that there must be affirmative evidence that something is obscene, that they, themselves, cannot determine this unless the evidence from the stand led them to this conclusion; that they are not to be handed the magazine to determine whether or not it is obscene, themselves.

(The Court) I think I can cut your argument short:

I have been thinking about it. The Court is not going to turn over any question to the jury as to whether or not any magazine is obscene.

However, there is a charge here that a man did sell a certain magazine, that that magazine has heretofore been adjudicated to have been obscene.

(T. 39) The Court is of the opinion, and so rules, that the magazine, itself, would be evidence of such a purchase, which would be a necessary element of the violation of the statute, that is, a purchase of such a magazine.

The Court feels that it would be the Court's duty to limit the purpose for which the magazine is admitted and to instruct the jury not to determine any questions of obscenity of the magazine.

I can't conceive, under our system of laws of procedure, of making either a sale or purchase of a particular thing and saying that that thing is not admissible in evidence.

I will have to admit it in evidence, but I will further instruct the jury there is no question before them of obscenity, that that is the magazine that is alleged and the receipt, also.

(Mr. Ritchey) If you had an automobile that was stolen, you don't bring the automobile in court.

It seems to me, to prove the elements of the offense, and that the elements of the offense is that, one, that it has been judicially determined to be obscene, and, two, that proper notice was given and that the purchase was made, that the vehicle, itself, would be unimportant.

If this was a proceeding to determine whether or not the magazine was obscene, then, yes, they need to see the magazine.

(The Court) No, sir, and you don't bring the Brooklyn Bridge in. There is always something that is physically impossible.

(T. 40) I don't recall anywhere it saying there is no reason to bring a magazine in.

(Mr. Ritchey) We reserve an exception.

(The Court) All right, gentlemen, let's take a few minutes.

(Thereupon, proceedings were in recess until 11:08 a.m., when, still out of the presence and hearing of the jury, the following proceedings were had and done:)

(Mr. DeCarlo) Judge, at this time the State would like to offer this decree, dated February 26, 1970, Minute Book No. 133, Entry 34, in the Circuit Court of Mobile County, Alabama, in Equity, decree by circuit judge Joseph M. Hocklander.

I would like to offer that, please, sir.

(Mr. Ritchey) I object to the offer of what purports to be a decree of that court.

The best evidence rule dictates that a copy of the decree, itself would be the best evidence.

We also argue that the requirement of notice in the statute under which the prosecution brings this case does not refer to any decree that might have been returned prior to the time such a notice is given.

This section says: "No prosecution may be commenced against any person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice, violated this Act."

(T. 41) There is nothing in all the wording of this statute that refers back to the Court's decree. There is nothing indicating that this defendant is bound by some court in Mobile to that decree, that enjoins a specific defendant from selling the magazines noted in that decree.

It doesn't refer to Chester McKinney, or to Paris Bookstall, and it doesn't refer to anything pertaining to this defendant.

I object to the decree referring to parties not involved in this case here that comes before Your Honor and before this jury.

(Thereupon, proceedings were in abeyance, following which the following proceedings were had and done:)

(Mr. Ritchey) When Your Honor finishes reading it, I would like to say something further.

(Thereupon, proceedings were in abeyance, following which the following proceedings were had and done:)

(The Court) Where is that pamphlet copy of that Act? This pocket part obviously doesn't embody all the charges.

(Thereupon, proceedings were in abeyance, following which the following proceedings were had and done:)

(The Court) That obviously wasn't changed, was it, that 374 (4), there (indicating)?

(T. 42) (Mr. Barnes) Judge, may I speak on that?

(The Court) Yes, sir. We don't need to have this on the record, here.

(Thereupon, ensued an off-the-record discussion, following which the following proceedings were had and done:)

(The Court) I am going to overrule the objection. Let me say this:

Unless you – I mean, I am going to overrule the objection and admit it in evidence.

I want to say this at this time: When the jury comes back, I think it ought to be offered and some objection to it made, and if, by agreement, we can say you don't need to recite all the grounds of objection, I suggest you say, "on all the grounds previously stated."

I don't want to put him in the position of having it re-offered and not objecting and having it say he has waived his grounds of objection.

I am trying to protect everybody without going into the entire thing.

(Mr. Ritchey) I have some additional grounds.

(The Court) If you have anymore grounds, why don't you put them in now?

(Mr. Ritchey) We have objected to it, and the grounds we have already made will be the same as if they were made when the jury comes back in, but I would like to object to the introduction of this decree on the further grounds that the parties respondent in this cause, in addition to the magazines involved in this (T. 43) matter is a Chris Zarocostas, individually and doing business as Nelson's News Stand, and others, citing the News Stand as a corporation; that the law, as propounded by the Supreme Court of the United States of America requires an adversary hearing be held on a magazine before it can be judicially determined to be obscene, and that the parties involved – the parties that would be involved after such determination be parties to that proceeding, and that Mr. McKinney has not been a party to any proceeding dealing with a judicial determination of the magazine "New Directions" being determined obscene.

It would appear that Mr. McKinney should not be, and we object to the introduction of this decree – be bound by a decree that the judge in a county some three or four hundred miles away, where he has no right, no opportunity, to determine upon what grounds the judge rendered the magazine to be obscene.

There are certain basic requirements set out by the Supreme Court of the United States to determine what obscenity is. We have not had the opportunity to find out – set out all those grounds there, to present to the judge law and evidence that would prove or disprove his determination of whether or not this magazine is obscene.

We don't know what happened in Mobile, because we were not a party to it, and we, on those grounds, feel that this decree should not be allowed into evidence.

(The Court) Overrule. All right, let's put the jury in the box.

(T. 44) (Thereupon, the jury was brought into the courtroom at 11:21 a.m., when, in the presence and hearing of the jury, the following proceedings were had and done:)

(The Court) All right, proceed, gentlemen.

Q. (By Mr. DeCarlo) Mr. Johnson, I believe you said that on March 31st you purchased magazines there at the Paris Bookstall? A. That is correct.

Q. All right. And I will ask you whether or not you purchased the – I will ask you to look at this book, here (indicating), that is marked State's Exhibit B, for identification.

I will ask you whether or not – first of all, look at it, please, sir (handing instrument to the witness). A. All right.

Q. I will ask you whether or not this book was one of the magazines you purchased on that day? A. Yes, sir, it is.

Q. Did you make any identifying marks, or anything, on the magazine, sir? A. I did. I put the date and time and my initials.

Q. On what portion of the magazine did you put the identifying marks on? A. On the upper lefthand corner of the inside cover page.

Q. Would you read it? A. "DHJ, 3/31/70, 11:20 a.m."

Q. And this is in your own handwriting? (T. 45) A. Yes, sir.

(Mr. DeCarlo) We would like to offer this magazine at this time, may it please the Court.

(Mr. Ritchey) We object, Your Honor, and assign as objection grounds already put in the record.

(The Court) All right, you may do that, and I overrule the objection.

Ladies and gentlemen, let me say this to you: You heard the testimony of the witness concerning the identifying markings which he placed on there.

I instruct you not to consider those markings for any purpose other than the fact this witness states he put those markings on there so that he would later know that magazine if he saw it again.

Other than that, it has no bearing on the issues.

(Thereupon, the said instrument referred to as a magazine, was received in evidence and re-marked by the court reporter as, "State's Exhibit B." Pursuant to Title 7, Section 827 (1), of the 1940 Code of Alabama, as recompiled, the court reporter in this cause hereby certifies that the reproduction of this exhibit in this transcript would be difficult, or impracticable. The court reporter in this cause further certifies that this exhibit is of such size as to make it impracticable to attach the same as a page, or pages, of this transcript, and that he has properly identified this exhibit and delivered it to the Clerk of this Court.)

(T. 46) Q. At the time you purchased this magazine, you obtained it from whom? A. Mr. McKinney.

Q. Did you pay Mr. McKinney? A. Yes, sir.

Q. Did you pay Mr. McKinney in the lawful currency of the United States of America? A. Yes, sir.

Q. After giving him the money, did you receive something in exchange for the money at the time you purchased the magazine? A. Yes, sir.

Q. What did you receive, if anything? A. A receipt.

Q. All right, sir. I show you State's Exhibit C, marked for identification (handing written instrument to the witness).

I will ask you to look at that, please, sir. Do you recognize that? A. Yes, sir.

Q. What is that, please, sir? A. It's a receipt from Mr. McKinney.

Q. Is it signed by Mr. McKinney? A. Yes, sir.

Q. Is it dated by Mr. McKinney? A. Yes, sir.

Q. And would you read the receipt for us, please, sir? A. "Received of D. H. Johnson, $10.07, For Purchase of Nude Figure, Body & Soul, and New – I can't make that word out – New Direction, No. 16."

(T. 47) Q. And signed by Mr. McKinney? A. Yes, sir, it is.

Q. And was this receipt prepared or done in your presence? A. Yes, sir, it was.

(Mr. DeCarlo) At this time I will introduce that, please, sir.

(Mr. Ritchey) No objection.

(Thereupon, the said written instrument was received in evidence and re-marked by the court reporter as, "State's Exhibit C." The said written instrument is set out in words and figures below as follows:)

STATE'S EXHIBIT C

"Received of J. H. Johnson
$10.07
For Purchase of
Nude Figure #1
Body & Soul Vol 3 #6
New Directions No. 16
Chester McKinney
March 31, 1970"

State's Exh #9

(END OF EXHIBIT)

Q. Mr. Johnson, at the time that you selected the magazine, or the magazines, was Mr. Barnes there with you at the time you made the selection? A. Yes, sir, he was.

Q. All right, sir. And, after making the selection, (T. 48) did you all leave some particular area of the store and go to another part of the store? A. Yes, sir. We walked up to what I would call the checkout counter.

Q. And that is where Mr. McKinney was, is that right? A. Yes, sir, that is correct.

Q. And did you see what Mr. Barnes did with the magazine, if he did anything with it, at that time? A. Yes, sir. He attempted to show the magazines to Mr. McKinney, the inside portions of the magazines.

Q. Let me ask you this: Did he flip through the magazines? A. Yes, sir, he did.

Q. And he did this in Mr. McKinney's presence? A. Yes, sir.

(Mr. DeCarlo) Judge, we have no further questions at this time.

(The Court) All right, you may cross examine him.

CROSS EXAMINATION

Q. (By Mr. Ritchey) Mr. Johnson, you didn't prepare the letter that Mr. Barnes handed over to Mr. McKinney, did you? A. No, sir, I did not.

Q. And when you went back on March 31st, did you go through – did you purchase magazines?

You stated you purchased some magazines prior to the purchase of three magazines shown by that receipt.

Was this done on March 10th, or March 31st? (T. 49) A. These magazines, here?

Q. No, sir, some other magazines. A. No. I purchased some other magazines.

Q. Was that on March 10th, or March 31st? A. March 10th.

Q. On your first visit to the store? A. Not my first visit, but a visit.

Q. Was Mr. Barnes with you there at that time? A. Yes, sir.

Q. The magazines that you purchased, then, was not the magazine that is involved today, this magazine, "New Directions"? A. No, sir.

Q. And, on March 31st, you went back to the store and purchased "New Directions"? A. Yes.

Q. Will you tell the purpose for going into the store on that occasion? A. To purchase the magazines.

Q. Did you know that the magazine was on sale there? A. This particular magazine?

Q. Yes. A. No, I did not.

Q. Did you find – did you find more than one copy of this magazine on sale there? A. I don't believe I did, no.

Q. Did you look to see if there were more than one? A. Yes.

Q. In other words, in your opinion this was the only copy of the magazine in the store on that occasion? (T. 50) A. Yes.

Q. How was it in the store?

Was it on display, in the front, or was it just there with other magazines, in general? A. It was on display, and there were a number of different titled magazines on the same rack.

Q. Isn't it true, Mr. Barnes (sic) that, generally, the magazines sold in this store are more than one in number, and they are lying up on those – that maybe five, ten, or maybe fifteen, are on those racks, and the magazine that is in the front of the stack is the same as the magazine in the rear, something like Time magazine?

Isn't that true? A. Normally, yes, sir.

Q. But you didn't find that in relation to this particular magazine? A. No, I don't think so.

Q. When you made the purchase, did you, or Mr. Barnes, inform Mr. McKinney that this was a magazine that you had previously given him a letter stating that it had been judicially declared to be obscene? A. No, I did not.

Q. Did you hear Mr. Barnes so inform him? A. I think he did.

Q. Did Mr. McKinney then express some surprise that he had a magazine such as –

(Mr. DeCarlo) We object to whether Mr. McKinney expressed surprise.

(The Court) I sustain the objection. Of course, if he made some statement there, it would be admissible (T. 51) as to what was said or done.

Q. Did you make some statement, or – you know, Mr. Barnes, (sic) if a man, when he states something to you, whether or not he has knowledge of what he is stating, or whether or not it is something that appears to be unknown to him; you can tell by his expression, by talking to the man, can't you? A. Yes, sir.

Q. Isn't it true that when Mr. Barnes purchased this magazine and informed Mr. McKinney that it was a magazine that he had previously given him a letter stating that this had been judicially declared to be obscene, did Mr. McKinney express, either by word or action, that this was a surprise to him?

(Mr. DeCarlo) I object, may it please the Court.

(The Court) Sustain to the question in that form.

Q. Did Mr. Barnes tell him that this was a magazine he had previously given him a letter about? A. Yes, sir.

Q. What did he say? A. About this magazine?

Q. Yes. A. He didn't say anything about this magazine.

Q. Isn't it a fact that all three magazines were magazines that had been mentioned in a letter similar to the one introduced in evidence here? A. To the best of my knowledge.

Q. Did Mr. McKinney make any statement when Mr. Barnes purchased these magazines, or you purchased these (T. 52) magazines, make any statement to you, or Mr. Barnes in your presence? A. Yes, sir.

Q. What did he say?

(Mr. DeCarlo) I object to any statement about any other magazine. If he wants to go into it, that means I will go into other magazines also.

(The Court) Let me say this, gentlemen: We have to do what we have to do, and sometimes certain phases of the evidence, whether it has anything to do with the issues involved, have to come out, because it is part of the res gestae.

So, I am going to overrule the objection. A. Would you restate the question?

Q. What was said by Mr. McKinney when Mr. Barnes informed him that he was selling magazines that he had, in effect, informed him not to sell? A. When I purchased the magazines, Mr. McKinney said, "Oh, my God, here is one that I missed."

(The Court) After you had informed him this was a magazine – A. I hadn't informed him.

Q. Mr. Barnes had informed him? A. I believe so.

Q. Did Mr. McKinney, when you presented this letter, you or Mr. Barnes presented this letter to him on March 10th – did he not tell you he would remove these magazines from his book stand? A. He didn't tell me.

Q. Do you know whether or not he told Mr. Barnes that in your presence? (T. 53) A. I do not.

Q. You do not know that. After you made this arrest and after you and Mr. Barnes had informed him that these were magazines that he was, in effect, not to sell, did he not tell you that he didn't know those magazines were in his bookstall, words to that effect? A. Yes, sir. Of course, I didn't arrest him.

Q. Well – at the time you purchased them, did he not tell you words to that effect? A. Only this one magazine.

Q. Did he deny that the others – that he knew anything about the others not being magazines that he should be permitted to sell? A. I believe he did say that, yes, sir.

Q. What you are saying is that he recognized one of the titles, but the other two he didn't recognize as being magazines that he was not permitted to sell, so far as the State was concerned? A. Yes, sir, I got that impression.

Q. And the magazine "New Directions," the magazine we are concerned with in this case, is a magazine that Mr. McKinney informed you and Mr. Barnes that he was not aware that he was permitted to sell, is that right?

(Mr. DeCarlo) We object to that.

(The Court) Did he single that one out and say, "This is the one I did not know," or just mentioned all of them? A. The inference was, Judge, that he didn't single out a particular magazine. He said he didn't know he wasn't supposed to sell these, or something.

(The Court) He didn't say "This is the one"? (T. 54) A. No, sir.

Q. That was not "New Directions" that he singled out, is that right?

(The Court) Let's find out what he did. A. He indicated one particular magazine.

(The Court) Did he say which one it was? A. Yes, sir.

(The Court) Which one did he say it was? A. I believe the title of that one was "Body and Soul."

(The Court) It was not "New Directions"? A. No, sir.

(The Court) I was completely lost.

Q. Now, Mr. Johnson, you were acting – when you went down to purchase this magazine with Mr. Barnes, under his instructions, you were under Mr. Barnes' supervision, is that correct? A. No, sir.

Q. Were you acting on your own? A. Under the directions of the Attorney General.

Q. All right. When you made these particular purchases, you later obtained a warrant for Mr. McKinney's arrest, you and Mr. Barnes, did you not? A. Yes, sir, I recall that a warrant was obtained.

Q. Based upon purchases that you made? A. Yes, sir.

Q. And that arrest was made, was it not, based upon the fact that you had previously – along with Mr. Barnes – served a letter on Mr. McKinney, which, in effect, informed him that particular magazines had been judicially declared to be obscene by another judge in (T. 55) another county, and that is the basis upon which you made the arrest? A. I didn't make the arrest.

Q. Did you make the complaint? A. I purchased the books.

Q. How was the arrest made? Who made the arrest? A. I don't know.

Q. Do you know who – who did you supply information to so that the arrest could be made? A. The district attorney's office and Mr. Barnes.

Q. In this county? A. Yes, sir.

Q. So, you don't know why the district attorney then made the arrest in this case, is that what you are saying? A. I can assume he has made the arrest.

Q. Is that an assumption based upon the fact that you had served this letter on March 10th and purchased the magazines listed in that letter on March 31st? A. I think that would be grounds for a warrant.

Q. You did not try, yourself, to determine whether or not the magazine was or was not obscene? A. No, I did not.

Q. You did not make a complaint or give evidence to the district attorney's office based upon your independent recommendation or assumption on whether or not this magazine was or was not obscene? A. No, I did not.

Q. All right. Let me ask you this, Mr. Johnson, if you were a witness in Mobile County, in a proceeding styled, "State of Alabama, ex rel MacDonald Gallion, (T. 56) Attorney General of the State of Alabama, ex rel Carl M. Booth, District Attorney, Thirteenth Judicial Circuit, State of Alabama" against the magazine, in other words "New Directions, No. 14 Vol. 4 No. 4"? A. I think I was subpoenaed for that hearing, yes, sir.

Q. Were you subpoenaed in that hearing? A. Yes, sir.

Q. Did you purchase the magazine, along with Mr. Barnes, that was the basis of that hearing? A. I don't know. I bought some magazines in Mobile.

Q. You don't know whether you bought the particular magazine, "New Directions, Vol. 14 (sic), No. 4"? A. No, I don't.

Q. You did testify, however, in the case, before Judge Hocklander, who is a circuit judge in Mobile County? A. I don't think I testified.

Q. You didn't testify in that case? A. No.

Q. You did not appear in that case, then? A. I appeared in court.

Q. But you did not testify? A. No.

(Mr. Ritchey) That's all.

REDIRECT EXAMINATION

Q. (By Mr. DeCarlo) You did know at the time you went in the Paris Bookstall that this magazine had been decreed by Judge Hocklander that it was obscene, "New Directions" was obscene, did you not, Mr. Johnson? (T. 57) A. Yes, sir.

(Mr. Ritchey) Your Honor, this is his witness. I don't think he should lead him.

(The Court) Yes, sir. Don't suggest to him.

Q. And I believe you said that Mr. McKinney, when he made reference to a book, "Here is one I missed," it wasn't in relation to the magazine, "New Directions," was it not? A. No, it was not.

Q. It wasn't directed to the magazine that is in question here today? A. No, sir.

(Mr. DeCarlo) We have no further questions from Mr. Johnson.

(The Court) All right, thank you, Mr. Johnson.

(WITNESS EXCUSED)

(The Court) Who is going to be the next witness?

(Mr. DeCarlo) Judge, we have one other matter we want to take up.

(Mr. Ritchey) I also want to exercise my right to cross examine Mr. Barnes more.

(The Court) Gentlemen, it is getting close to lunchtime. If you have got some further cross examination – I don't want to take up –

(Mr. DeCarlo) I wanted to offer, at this time, the decree of Judge Hocklander.

(The Court) All right, go ahead. That is what exhibit number?

(Mr. DeCarlo) Let me get it marked.

(T. 58) (Thereupon, a written instrument was received by the court reporter and marked, "State's Exhibit D, for identification.")

(Mr. DeCarlo) Judge, I would like to offer State's Exhibit D, marked for identification. We would like to offer that into evidence.

(Mr. Ritchey) Your Honor, I want to renew my objection to the offering of this decree and renew the grounds that have previously been stated, but I wish to add one further ground.

(The Court) All right.

(Mr. Ritchey) And that is to the style of the cause in this decree which refers to the respondent, one of the respondents, the magazine "New Directions, No. 14, Vol. 4, No. 4," and the decree, itself, refers to "No. 16, Vol. 4, No. 4," and I state to Your Honor that the decree refers to a magazine that was not even a party respondent to the cause, and, for that reason, I renew my objection to the introduction of that decree into evidence.

"New Dimensions (sic)," the magazine we are involved with today, is not a party respondent to that cause.

(The Court) You mean, "New Directions"?

(Mr. Ritchey) "New Directions." Excuse me. I say that the decree is defective and shouldn't be admitted into evidence.

Judge Hocklander would have no authority to rule upon a magazine that is not a party respondent to the cause.

(T. 59) (The Court) If you are finished now, let me know.

Everytime I start to read, you start again.

So, finish everything you are going to say.

(Mr. Ritchey) Excuse me.

(The Court) On the basis that Judge Hocklander, in the body of his order, did order, adjudge, and decree in regard to "New Directions, No. 16, Vol 4, No. 4," notwithstanding the fact that it is referred to in the style of the case differently, I overrule the objection and do admit it in evidence.

(Mr. Ritchey) We except, Your Honor.

(Thereupon, the said written instrument was received in evidence and re-marked by the court reporter as,

"State's Exhibit D." The said written instrument is set out in words and figures below as follows:)

STATE'S EXHIBIT D

STATE OF ALABAMA	) "State's Exh 3
COUNTY OF MOBIILE	)Entered on FEB 26 1970
STATE OF ALABAMA, ex rel	)Min Book No: 133 Entry 34
MACDONALD GALLION, Attorney	)W. Elsworth Haughton, Register
General of the State of	)IN THE CIRCUIT COURT
Alabama, ex rel CARL M.	)OF
BOOTH, District Attorney,	)MOBILE COUNTY, ALABAMA
Thirteenth Judicial Circuit,	)IN EQUITY
State of Alabama,	)Nos. 76398; 76399; 76401;
Complainants,	) and 76397
(T. 60) vs	)
THE MAGAZINE, "JAYBIRD USA" No. 16,	)
Volume 4, No. 4; THE MAGAZINE, "NEW	)
DIRECTIONS" No. 14 Volume 4, No. 4;	)
THE MAGAZINE, "NUDISM TODAY" No. 35,	)
Volume 6; THE MAGAZINE "JAYBIRD	)
JOURNAL" Volume 5, No. 2; CHRIS	)
ZAROCOSTAS, individually and d/b/a	)
NELSON'S NEWS STAND: NELSON'S NEWS	)
STAND, Inc., a Corporation, d/b/a	)
NELSON'S NEWS STAND,	)
Respondents.	)

DECREE

This cause coming on to be heard and submitted to the Court upon the verified complaint of the State of Alabama and upon the exhibits thereto, being the aforenamed magazines; and the answer as filed by the Respondent, and upon testimony taken ore tenus with all parties present and represented by counsel in open Court; and four suits having been consolidated to include all of the above stated magazines; and upon the prayers in said Bill of Complaint that said magazines be adjudicated and determined and

declared to be obscene within the meaning of Alabama Law and that pursuant to said finding, an injunction issue out of this Court directed to the named Respondents against the further possession, sale or distribution of the aroresaid magazines: and the same having been considered,

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED (T. 61) by the Court that the magazines "Jaybird USA" No. 16, Volume 4, No. 4; "New Directions" No. 16, Volume 4, No. 4; "Nudism Today" No. 35, Volume 6; and "Jaybird Journal" Volume 5, No. 2, should be, and the same are hereby, judicially declared to be obscene within the meaning of Alabama Law: that each of the aforenamed magazines have been determined to be mailable matter but which were received by freight shipment; and said magazines are further declared to be contraband and that the Sheriff of Mobile County is directed to seize and destory all of said magazines.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the aforenamed Respondents are enjoined from selling, exhibiting or distributing the magazines aforenamed.

This 26th day of February, 1970.

/s/ Joseph M. Hocklander
CIRCUIT JUDGE

I W. Elsworth Haughton, Register of the Circuit Court of Said State and County, do hereby certify that the foregoing two xerox pages contain a full, true and complete copy of the Decree in a certain cause heretofore pending, in said Circuit Court, wherein State of Alabama, ex rel, MacDonald Gallion, Attorney General of the State of Alabama, ex rel Carl M. Booth, District Attorney, Thirteenth Judicial Circuit, State of Alabama, Complainants and THE MAGAZINE, "JAYBIRD USA" No. 16, Volume 4, No. 4; THE MAGAZINE, "NEW DIRECTIONS" No. 14, Volume 4, No. 4; THE MAGAZINE,

"NUDISM TODAY" No. 35, Volume 6; THE MAGAZINE "JAYBIRD JOURNAL" Volume 5, No. 2; (T. 62) CHRIS ZAROCOSTAS, individually and d/b/a NELSON'S NEWS STAND: NELSON'S NEWS STAND, Inc., a Corporation d/b/a NELSON'S NEWS STAND, Respondents as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court at office in Mobile, Ala. this 1st day of April A.D. 1970.

/s/ W. Elsworth Haughton
Register"

(MOBILE COUNTY, ALABAMA, CIRCUIT COURT SEAL)

1.55

Nos. 76,398, 76,399,
76,401 and 76,397

STATE OF ALABAMA, ex rel

vs.

THE MAGAZINE "JAYBIRD USA"
No. 16 Volume 4, No. 4, et al"

(END OF EXHIBIT)

(Mr. DeCarlo) Judge, that's all we have at this time.

(The Court) Gentlemen, it is so close to noon, rather than to go ahead and further cross examine Mr. Barnes at this time, unless it is going to be very short, we are going to go ahead and recess for lunch.

(T. 63) Do you anticipate it will take you longer than ten minutes to cross examine?

(Mr. Ritchey) I would say no more than fifteen or twenty minutes. It depends on his answers.

(The Court) Ladies and gentlemen, we will go ahead and go to lunch at this time.

Let me caution you, don't talk about this case among yourselves, and don't let anyone talk about it in your presence, or hearing.

Do like you did this morning, go into the jury room, and I will ask all of you to come out at the same time.

All right, we will see you at 1:30.

(Thereupon, proceedings were in recess from 11:48 a.m. until 1:30 p.m., of the same day, at which time the following proceedings were had and done:)

1:30 P.M.

AFTER NOON RECESS

(The Court) All right, let's see, gentlemen, I believe we were down to where the State rested.

(Mr. DeCarlo) Yes, sir.

(The Court) And I believe the defense wanted to recall Mr. Barnes?

(Mr. Ritchey) Yes, sir.

MR. CHARLES H. BARNES

recalled as a witness, was examined and testified further as follows:

(T. 64) **RECROSS EXAMINATION**

Q. (By Mr. Ritchey) Mr. Barnes, you were present when the district attorney, here, introduced the decree of Judge Hocklander, in Mobile, in the case of the State of Alabama and MacDonald Gallion, attorney general, and so forth, against a magazine, "New Directions – A. You asked me was I present?

Q. " – Volume 14 (sic), No. 4."

Were you present when that decree was rendered? A. No, sir.

Q. Did you take part in obtaining – any part in obtaining that decree in that court?

By that, I mean, did you file any pleadings in that court? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you testify in that hearing, or that trial? A. No.

Q. Did you have anything to do with the purchase, or the arrest of the defendant, Carl Booth, I believe his name was?

No, wait a minute, the defendant, "Nelson's News Stand," did you have anything to do with his arrest, preparing the evidence, or preparing the presentation, or participating in the presentation, or anything to do with that? A. My associate handled that case.

Q. You had nothing to do, actively, with preparing this particular case? (T. 65) A. My associate filed pleadings in that case.

Q. Who was that? A. Assistant attorney general Bob Morrow.

Q. But you neither testified or had any participation in the pleadings? A. No, I didn't.

(Mr. DeCarlo) I object to that.

(The Court) Overrule. I assume these questions are preliminary.

Q. You, then, I take it, are not aware of what was presented to the Court in that case in order for it to determine whether or not this magazine, "New Dimensions," was or was not obscene? A. I was not at the hearing.

(Mr. DeCarlo) I object, may it please the Court. No bearing on this issue, here.

(The Court) What is the purpose of this, Mr. Ritchey?

(Mr. Ritchey) Judge, the determination of what is and what is not obscene has been clearly set down by the Supreme Court of the United States, and if this man participated in that hearing I was going to question him as to what was presented to that Court.

(The Court) I sustain the objection. He said he did not participate.

(Mr. Ritchey) He wouldn't know anything about it if he did not participate.

(The Court) That is correct.

Q. I take it that you were later supplied with a copy of the decree in that case? A. Yes, sir.

(T. 66) Q. And that, based upon that decree, you prepared the letter that you testified previously was delivered to Chester McKinney, at the Paris Bookstall? A. That is correct, sir.

Q. I will ask you if, at anytime, to your knowledge, through the auspices of your office, there was any attempt made to have this magazine, "New Dimensions," Volume 16, No. 4, Volume 4 (sic) declared to be obscene by a judge in this Circuit?

(Mr. DeCarlo) We object to that question. The law specifically states that once it has been adjudicated as obscene –

(The Court) I am going to sustain the objection. If the law should require it be done in this Circuit and the evidence doesn't show that it was, then the defendant would be protected.

I am going to sustain the objection as to going into every Circuit. You could go into every state and every country in the world.

I sustain the objection.

(Mr. Ritchey) We except, Your Honor.

(The Court) I understand that this is based on the decree of Judge Hocklander, which, of course, speaks for itself.

(Mr. Ritchey) Your Honor, I have no other questions in view of the fact that he didn't participate.

I had assumed he had participated in that action in Mobile.

We have no further questions.

(Mr. DeCarlo) We have no further questions.

(WITNESS EXCUSED)

(The Court) All right. The State has rested, (T. 67) I understand.

(Mr. Ritchey) If the State rests, I would like to make a motion before the Court.

(The Court) Do you want to do it in the presence or absence of the jury?

(Mr. Ritchey) Whatever Your Honor says.

(The Court) Well, then, you may proceed.

(Mr. Ritchey) May it please the Court, I would at this time move to exclude the evidence presented by the State, and set out the following as grounds for my motion:

First, I would say that we are proceeding in this matter based upon a decree rendered by a judge in the Circuit Court of Mobile, which is a different judicial circuit that the one in which Your Honor and this trial is being held.

I state to Your Honor that Chester McKinney, here, was not a party to those proceedings, that, apparently, the magazine "New Directions, Volume 16, No. 16, Volume 4, No. 4 (sic)," was not a party respondent to those proceedings.

That the only evidence presented to Your Honor as to the magazine "New Directions, Volume 16, No. 4 – No. 16, Volume 4, No. 4" is a copy of a decree which, on its face, shows that the respondent in the case was the magazine "New Dimensions (sic), No. 14 – no, No. 16, Volume 4, No. 4," and, Your Honor, I think that the burden of proof is on the part of the State to prove that was an error by showing the complete record of that case.

For all that we know and from all that the (T. 68) evidence would show at this time, the party respondent to that cause was "Volume 14" and not Volume 16," and if that were true no matter what the decree, itself, may show, then the magazine we are involved with today and the magazine

which caused the arrest of Chester McKinney, here, was not a party respondent.

Your Honor well knows this, perhaps, was a typographical error, but there has been no proof that was a typographical error.

It would be incumbent upon the State, I think, to bring in a bill of complaint to show that the proper parties were there, or whoever is in the decree.

I don't know where Mr. Elsworth Haughton, who is Register of the Circuit Court in Mobile, obtained information as to the style of the cause. He could have obtained it off anything except this final decree, but this refers to the fact that the respondent in this is "New Dimensions (sic), No. 14, Volume 4, No. 4."

That is one of my grounds for moving to exclude the evidence, because without a different decree against this magazine – and, even though we have all along insisted that this is not a proper procedure to begin with under the law, that the law the State is proceeding on doesn't show that this is the procedure that this defendant can be arrested on.

If we were to accept that as being a fact, that is to say, that the decree is defective and all the evidence could not apply against Chester McKinney, let's assume –

(Mr. DeCarlo) May it please the Court, are we in argument now?

(T. 69) (The Court) Overrule. I will let him state his motion. I thought we were just going to make a formal motion.

I am going to go ahead and let the jury go back at this time.

Let me go ahead and get this portion over with. This is just a ruling that the Court has to make.

Just step back there to your jury room for a few minutes.

(Thereupon, the jury left the courtroom at 1:45 p.m., and, out of the presence and hearing of the jury, the following proceedings were had and done:)

(The Court) All right, proceed.

(Mr. Ritchey) As second grounds for my motion, Your Honor, we take the position that the procedure used by the State of Alabama in this matter is not the proper way and that the State has failed to put on affirmative evidence to prove that the magazine, "New Directions, No. 16 (sic), Volume 4, No. 4," – from now on I am going to refer to that as "New Directions."

(The Court) All right.

(Mr. Ritchey) To keep anyone from being confused. That the Supreme Court of the United States has clearly stated in their decisions – and I have provided Your Honor with practically every case up until August of this year on the subject – if Your Honor will carefully read those decisions, you will see that the decisions have almost unanimously stated that where the (T. 70) question of the obscenity of a magazine is involved that it is pertinent on the part of the State to prove by affirmative evidence that the magazines are obscene, that this is not a matter to be left to the judgment of the jury and the judge, that they do not represent the community standards that the Supreme Court requires in this case.

I realize this argument is made taking the position that the State's procedure in this case of taking a decision in Mobile and filing a letter – we contend this is not a proper procedure, but, assuming it not to be proper procedure, we

state it is incumbent upon the State to prove by affirmative evidence this magazine is obscene and proof of it by national community standards.

The courts, in practically every decision now being decided by the Supreme Court of the United States, state that three elements must be found before a defendant can be convicted of selling what we call obscene materials, and those are the elements of pandering, as proscribed by the Supreme Court of the United States in the case of Ginzburg versus the United States; that there must be an intrusion into the privacy of unwilling individuals that want to avoid involvement with this type of material, and that there must be selling, or offering to exhibit to sell this type of material to juveniles.

Now, Your Honor, all three of these elements are missing. There has been no proof of any pandering, or intrusion on the privacy of unwilling individuals. There has been no proof by Mr. Barnes that there was, (T. 71) in fact, an intrusion on his rights to go in or not to go into this place.

(The Court) Ferris, this whole prosecution is obviously based on this procedure that is set forth in this statute, on which this case is being tried, having to do with prior adjudication.

The authorities that you placed on my desk this morning, I haven't had an opportunity to read them.

Do any of them deal with the question? In short, has this procedure, under which this case is being prosecuted – has it been tested yet?

(Mr. Ritchey) These cases state that even if something is obscene, that even if Chester McKinney admits and everyone admits he is selling something obscene, that before he can be convicted for selling something obscene you must have proof that Chester McKinney has been pandering, or what he is selling invades the rights for privacy.

(The Court) Did any of these take up a particular procedure in law where we have got involved what we have got involved here?

(Mr. Ritchey) Not the particular situation, itself. I don't know if any other state has the same procedure we have here.

(The Court) Usually, one is adopted from somebody else. If one state doesn't have rulings on it, then another one has it.

I realize that somebody has got to be first.

(Mr. Ritchey) Your Honor, I would say this:

Maybe I am carrying it further than it ought to go, but it would seem to me that the Supreme Court (T. 72) cases are saying in effect that even if something is obscene you must have these three elements to convict him on it.

(The Court) Let me cut you off. I will ask you one further thing:

Did the proceeding, wherein Judge Hocklander ruled – was that appealed from?

(Mr. Ritchey) I know nothing about that decision. This is the first time we have been faced with this decision.

(The Court) Was it, Mr. Barnes?

(Mr. Barnes) No, it wasn't appealed. No appeal has issued.

(The Court) Wasn't there another decree in Huntsville?

(Mr. Barnes) Two in Mobile, one here, seven in Huntsville, and one in Fort Payne.

(Mr. Ritchey) This case here is on appeal now from Judge Barber. It still doesn't involve the question you are talking about, whether or not they made the arrest in Mobile based upon Judge Barber's decision.

(The Court) The phase of it that it happens to be another judicial circuit, to me that would be almost a frivolous argument, but I am talking about where this whole business of the Court passing on this question of obscenity and whether or not that has been passed on.

(Mr. Ritchey) Your Honor, I know you know Herbert Jenkins, city attorney, who has ruled on the obscenity cases in the City of Birmingham.

(T. 73) (The Court) I don't know him.

(Mr. Ritchey) His function has been to handle the obscenity cases coming before the City. He has been prosecuting.

I would like to quote, Your Honor, a paragraph of an article he wrote in May, 1970, for the Alabama Municipal Journal –

(The Court) I have no intention of using such a thing as that as an authority.

I don't want to cut you off, but I think that when we get off into something like that we are wasting time.

(Mr. Ritchey) I wanted to quote something to show that he is repeating exactly what the Supreme Court has said is necessary for a conviction.

(The Court) I have got to make a ruling, myself, and not on what he thinks.

(Mr. Ritchey) He is quoting the Supreme Court.

(The Court) Will you argue the law? Let's don't get off – we are not writing something for a law journal. You are asking me to pass on a question of law.

(Mr. Ritchey) Judge, I am asking you, sir –

(The Court) Don't tell me what some other lawyer told somebody what they thought the law was.

You are a better lawyer than that.

(Mr. Ritchey) Your Honor, my three points of my motion –

(The Court) Proceed.

(Mr. Ritchey) – had to do with the statement that says – well, I will quote the cases if you would (T. 74) like. They are set out in the memo you have, on page 34, 35, 36, and 37.

(The Court) Which memo?

(Mr. Ritchey) The memo on the law in support of the defendant's motion to quash.

(The Court) All right, proceed. I follow you.

(Mr. Ritchey) Roman numberal V, the heading, "THE DEFINITION OF WHAT IS OBSCENE DOES NOT BECOME CONSTITUTIONALLY RELEVANT UNTIL THE DISSEMINATOR IMPERMISSIBLITY ENCROACHES ON THE RIGHTS OF OTHERS."

Your Honor, in that paragraph and the pages following that heading are listed some numerous cases which, in effect, say – and I would rather summarize them than read it.

(The Court) I would rather you would, too.

(Mr. Ritchey) Which, in effect, says that unless the State – we are dealing with adults – that unless the State proves pandering, the sort of pandering we had in this Ginzburg case – unless the State proves pandering in the conduction of the defendant's business, and that there was intrusion into the privacy of unwilling individuals who want to avoid confrontation with this kind of material, and unless the State proves there were sales, or offering to sell or exhibit to minors, that the defendant cannot be convicted of obscenity, that an adult is protected with his First Amendment rights to sell this type of material.

Basically, that is what it says.

(The Court) All right. Overrule. Let's put the jury back in the box.

(T. 75) (Thereupon, the jury was brought back into the courtroom at 1:58 p.m., when, in the presence and hearing of the jury, the following proceedings were had and done:)

(THE FOREGOING WAS ALL THE EVIDENCE IN THE CASE)

(The Court) All right, you gentlemen may proceed with the arguments at this time.

(Thereupon, Mr. DeCarlo addressed the jury, in opening argument, on behalf of the State, there being no objections made, nor exceptions reserved. Following Mr. DeCarlo, Mr. Ritchey addressed the jury, in argument, on behalf of the defendant, during which the following proceedings were had and done:)

(Mr. DeCarlo) I object to that, Judge.

(The Court) Gentlemen, due to the fact we are not concerned here with – it is not a jury question as to whether or not this is an obscene magazine.

I am going to sustain the objection to the illustration of some man showing obscene movies in his own home.

I am going to sustain the objection to that kind of argument.

(Mr. Ritchey) We reserve an exception.

(Thereupon, Mr. Ritchey continued addressing the jury, in argument, on behalf of the defendant, during which the following (T. 76) proceedings were had and done:)

(The Court) I would prefer you left the law to me. I am going to charge the jury as to the law, Mr. Ritchey.

(Thereupon, Mr. Ritchey continued addressing the jury, in argument, on behalf of the defendant, during which the following proceedings were had and done:)

(Mr. DeCarlo) We object to that, if the Court please, to any comparison with any other book.

(The Court) I am going to sustain the objection to that line of argument.

(Mr. Ritchey) We except.

(Thereupon, Mr. Ritchey continued addressing the jury, in argument, on behalf of the defendant, there being no further objections made nor exceptions reserved. Following Mr. Ritchey, Mr. DeCarlo addressed the jury, in closing argument, on behalf of the State, there being no objections made, nor exceptions reserved. The following proceedings were then had and done:)

(The Court) Ladies and gentlemen, we are down to that point where it becomes my duty to charge you as to the law.

Before I do that, we are going to take a little recess. So, you ladies and gentlemen may go out and be comfortable for a few minutes, and I will (T. 77) charge you and turn the case over to you.

(Thereupon, proceedings were in recess from 2:28 p.m. until 2:50 p.m., of the same day, at which time the following proceedings were had and done:)

(T. 78) **COURT'S ORAL CHARGE**

Now, ladies and gentlemen, the defendant, as a matter of law, enters into this trial with the presumption that he is not guilty as charged in the complaint.

Now, if at any time I refer to this complaint as an indictment – and I am going to say something about that in a few minutes, because I don't want you to be confused – if I refer to it as an indictment, consider that I said "complaint," because I don't mean an indictment; I mean a complaint.

Now, the defendant, as a matter of law, enters into this trial with the presumption that he is not guilty as charged in the complaint.

Now, this is a presumption of law, ladies and gentlemen, and it is also what is called in law as a presumption of evidence, and it is such that it can be overcome only by evidence of the defendant's guilt beyond a reasonable doubt and to a moral certainty, and the burden is on the State of Alabama to so convince you, that is, to convince you from the evidence beyond a reasonable doubt and to a moral certainty of the guilt of the defendant before you can convict him.

Now, the terms "reasonable doubt" and "moral certainty" are interchangeable terms, and, legally, they are equivalents of each other. And (T. 79) that means, if you are convinced, of course, from the evidence beyond a reasonable

doubt, you would be convinced to a moral certainty, and the reverse would be true.

A "reasonable doubt", ladies and gentlemen – that term "reasonable doubt" is self-defining, because a reasonable doubt means a doubt that is reasonable, or a doubt for which a reason can be given, and, of course, by a reason, the law means a sound, sensible reason.

Now, when the law says you must be convinced beyond a reasonable doubt, it doesn't mean that you must be convinced beyond an imaginary doubt, or fanciful doubt. It means you must be convinced beyond a reasonable doubt.

If you take the term "to a moral certainty," the law does not require that you be convinced to a mathematical certainty, because, in all probability, you never would be convinced to a mathematical certainty in a case where you depend on the testimony of human beings.

The best rule of thumb which the law gives us to go by which you can use to determine whether you are or whether you are not convinced from the evidence beyond a reasonable doubt and to a moral certainty of the guilt of the defendant is this: If, after a full and fair consideration of all the evidence in the case, there remains in your minds an abiding conviction that the defendant is (T. 80) guilty as charged, then you would be convinced beyond a reasonable doubt, and, in that event, he should be found guilty. After that same full and fair consideration of all the evidence, if there does not remain in your minds an abiding conviction that the defendant is guilty as charged, then you would not be convinced beyond a reasonable doubt, and, in that event, the defendant should be acquitted.

Now, the complaint, ladies and gentlemen – I am going to read this complaint to you again in a few minutes – the complaint is not evidence against the defendant. The complaint is merely the pleading on which this case is tried.

This complaint states the formal charges which are brought against the defendant, that is, the charges under which he is being tried, and, to those charges, the defendant says that he is not guilty.

Now, those two things, that is the formal charges in the complaint, on the one hand, and the plea of not guilty, on the other hand, go to make up the issues we are trying here today, but the complaint is not evidence against him.

This would be a good time for me to go a little further into that, ladies and gentlemen: This offense, charged against this defendant, is what is known to our law as as a misdemeanor. It comes here on appeal from the Jefferson County Criminal Court.

(T. 81) Now, this trial which we are in right now, this is what is known to the law as a trial de novo, that is, a new trial, as if no other trial was ever held. That is, anyone who is tried in a lower court and doesn't like the outcome has a right to appeal the decision and have it tried before another judge and have another trial before a jury, and it wouldn't be right for you to speculate as to what may or may not have been done in the other trial, or to give any weight to it. This is a new trial, as if there had never been another trial. The fact that there was another trial is not a circumstance for you to consider in this case.

Now, ladies and gentlemen, you are the triers and the finders of the facts in this case from the evidence, and in determining the facts and in passing on the guilt or innocence of the defendant you are confined to the evidence that has been presented to you here from this witness stand. You should not go outside that evidence, except you should use your common sense and experience that you have gained in your everyday affairs of life. You are to take that common sense and that experience that I speak of into the jury box with you and back there in the deliberation room and to use them.

Now, the law says that you are the sole and exclusive judges of the evidence and of its weight and sufficiency, and, not only that, you (T. 82) are the sole and exclusive judges of the credibility of the witnesses. You are to determine what weight you will give the testimony of the witnesses, and, in making that determination, among other things, you may consider any interest, any prejudice, any bias, any relationship, or any other thing that you might find a witness has, if, in your judgment, it would tend to keep that witness from testifying to the truth.

You may consider a witness' appearance and demeanor on the witness stand in considering what weight and what credibility you will give to that witness' testimony.

Now, if you can reasonably reconcile the testimony of the witnesses so as to make all of them speak the truth, you should do so, but if you can't, of course, it is up to you to determine what testimony you find to be true and what testimony you find to be untrue, and, of course, to consider only that testimony which you find to be true and disregard that which you find to be untrue.

If you should determine that any witness has willfully testified falsely to a material matter in the case, then, in your discretion, you may disregard all or any part of that witness' testimony. You will notice, the way I said that – well, I said, in order to justify you in disregarding the testimony of the witness you must find that that witness has willfully testified falsely to a material (T. 83) matter in the case. Now, by willfully testifying falsely, ladies and gentlemen, the law does not mean a situation where you might find that a witness has made a mistake of fact in trying to tell the truth. By willfully testifying falsely, the law means a situation where you might find that a witness has testified to something that that witness knows to be untrue in an attempt to mislead the jury.

Now, the complaint in this case, ladies and gentlemen – I am just going to read the formal charge to you. It charges that: Chester McKinney That, within twelve months before

the commencement of this prosecution, Chester McKinney did with knowledge of its contents, exhibit, sell and have in his possession with intent to sell obscene printed or written material; said material known by him to have been judicially found to be obscene under the provisions of Alabama law, to wit: a magazine entitled "New Directions Number 16 Volume 4 Number 4", in violation of the Code of Alabama 1940 as recompiled in 1958, Title 14, Section 374 (4) pocket part, against the peace and dignity of the State of Alabama. Signed, Earl C. Morgan.

Now, ladies and gentlemen, the Code of Alabama provided that: Every person who, in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercialy distribute, or to give away or offer (T. 84) to give away, any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the Court.

Now, the question of guilt or innocence is for the jury. In the event that the jury found the defendant guilty, they could – if they left it at that and didn't go any further, it would be up to the Court to fix the punishment completely within the limits set by this statute.

If the jury saw fit, if they found him guilty, they could also access a fine up to two thousand dollars. It couldn't be over two thousand dollars. In the event of such a finding, the Court could still access punishment, that is, imprisonment in the county jail, or hard labor for the county for up to one year.

Now, let me say this to you, ladies and gentlemen – I want to say this before I pass on to some other questions

involved. The questions to be determined by the jury from the evidence are these: Did the defendant, in this state, prepare, well, exhibit, commercially distribute, give away, offer to give away, or have in his possession with (T. 85) intent to sell or commercially distribute, or to give away, or offer to give away, any mailable matter known by him to have been judicially found to be obscene by a circuit court of the State of Alabama – that would be a state court – or by the Court of Appeals of Alabama, or the Court of Criminal Appeals of Alabama, or by the Supreme Court of Alabama.

Now, ladies and gentlemen, you are not concerned in this case with any determination of obscenity. You will notice that the Court has told you that the question for the determination of the jury is that of the guilt or innocence of the defendant.

This magazine was admitted in evidence by the Court, and this magazine is a magazine which is alleged by the State to have been a magazine judicially determined to be obscene by another judge of the State of Alabama, that is, Judge Hocklander, and that, subsequent to that, they contend that the defendant had notice of this judicial determination, and that, knowing that, that he did then sell to them this magazine, knowing at the time that it had been judicially determined to be obscene.

Now, as I say, due to the fact that this magazine is part of the evidence in the case, it is part of the alleged offense, that is, with certain knowledge – the State contends, with that knowledge, (T. 86) the defendant sold it – since it is involved and it has to be admitted for that purpose, it is in evidence. It is not for you to make any determination on the question of obscenity.

It is not the jury's function to go behind a judicial determination that something is or is not obscene. As I said to you before, the questions for you to determine in passing on the guilt or innocence of the defendant are these: Did the

defendant, in this state, prepare, sell, exhibit, commercially distribute, give away, offer to give away, or have in his possession with intent to sell or commercially distribute or to give away or to offer to give away any mailable matter known by him to have been judicially found to be obscene by a circuit court of the State of Alabama.

Now, ladies and gentlemen, if, after a full and fair consideration of all the evidence in this case – if you are convinced from that evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in this complaint, then it would be your duty to return a verdict reflecting that finding, and, in that event, the form of your verdict would be: We, the jury, find the defendant guilty as charged in the complaint – and you may, in your discretion, also, in addition to that, access a fine up to and including two thousand dollars. It could not be more than two thousand dollars. It could be any amount less, or it wouldn't have to be a fine at all.

(T. 87) On the other hand, if you are not so convinced from the evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged, it would be your duty to return a verdict finding him not guilty, and, in that event, the form of your verdict would be: We, the jury, find the defendant not guilty.

Now, whatever verdict you return, ladies and gentlemen, must be an unanimous verdict. It must be the verdict of all twelve of you, and that verdict should be signed by one of your number whom you select as your foreman.

Now, the clerk has prepared verdict forms here for your convenience. There is a form here for any verdict which you might return, and they will be sent out with you, along with the complaint and exhibits, when you go out to deliberate and make up your verdict.

What says the State?

(Mr. DeCarlo) State is satisfied, Your Honor.

(The Court) Are there any exceptions for the defense?

(Mr. Ritchey) Your Honor, I would like to note an exception to the record concerning what we contend, based on the fact that three elements are necessary, even after a magazine is obscene.

Should I do that later?

(The Court) You had better do that, (T. 88) quietly, here.

(Mr. Ritchey) I object to Your Honor not charging the jury as to the elements of pandering, intrusion on the rights of others, or selling or offering to exhibit to juveniles under any state statute reflecting a specific and limited state concern for juveniles in determining the guilt or innocence of the defendant.

(The Court) All right. Now, ladies and gentlemen, I have here a written charge which I give you at the request of the defendant. He has a right to request the charge and to have it given. It states correct propositions of law, and there is nothing in it that would in anywise conflict with the law I just stated to you, and it should be considered by you along with the law I just stated to you.

(Thereupon, the Court read a written charge, requested by the defense, following which the following proceedings were had and done:)

(The Court) Now, ladies and gentlemen, that does complete the Court's charge, and you may retire to the jury room to deliberate and make up your verdict.

(Thereupon, proceedings were adjourned at 3:08 p.m., November 10, 1970, and, at 3:26 p.m., of the same

day, (T. 89) in the presence of counsel for defendant and the defendant, the following proceedings were had and done:)

(The Court) Let's see. I believe you had a question you ladies and gentlemen wanted to ask?

(A Juror) Yes, sir.

(The Court) All right.

(The Juror) What we were wanting to know about, if we just say we found him guilty, or which ever way the case might be, if we were to set a fine, then could you come back and give time?

(The Court) It would be up to the Court. The Court would have a discretion to do that under those circumstances if the Court saw fit.

(The Juror) That is the main thing.

(The Court) All right.

(The Juror) We couldn't give time and the amount?

(The Court) If you convict, it wouldn't be binding upon me in any way at all.

The law says that it is up to the Court. It wouldn't be binding on the Court.

(The Juror) That is what I was thinking, too. Thank you.

(The Court) All right. Okay.

(Thereupon, the jury returned to the jury room at 3:28 p.m., of the same day.)

CERTIFICATE

STATE OF ALABAMA)

JEFFERSON COUNTY)

I. J. L. Narkates, do hereby certify that I reported in shorthand the proceedings in the above-styled cause at the time and place stated in the caption hereof, that I later reduced my shorthand notes to typewriting, or under my supervision, and the foregoing pages, beginning with the word "Proceedings," where the same appears in the center of the page, following the style of the cause, the caption, and the appearances, contain a true, correct, and complete transcript of the proceedings as therein set out.

I further certify that I have set out in words and figures in the said transcript all the exhibits not impracticable to be copied into the record and that pursuant to Title 7, Section 827 (1), of the 1940 Code of Alabama, as recompiled, any exhibit not copied into this record the reproduction of this exhibit in this transcript would be difficult, or impracticable. I further certify that any exhibit which is of such size as to make it impracticable to attach it as a page, or pages, of this transcript, has been properly identified and delivered to the Clerk of this Court.

I further certify that I have, on this day, notified counsel of the filing of this transcript in the office of the Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama.

This 23rd day of March, 1971.

/s/ J. L. NARKATES,
Official Court Reporter

(Filed March 23, 1971)
Julian Swift, Clerk

APPEAL BOND – HARD LABOR SENTENCE

THE STATE OF ALABAMA)

JEFFERSON COUNTY)

KNOW ALL MEN BY THESE PRESENTS, That we Chester E. McKinney principal, and Salem E. RITCHEY, George Ritchey & Edna Ritchey by Ferris S. Ritchey, Jr., Atty in fact as sureties, are held and firmly bound unto the State of Alabama in the sum of Two Thousand and no/100 ($2000.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama as against this bond.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, the above bounden Chester E. McKinney was on the 10th day of November, 1970, convicted in the Circuit Court of Jefferson County, Alabama, for the offense of Selling mailable matter judicially determined to be obscene and had assessed against him a fine of Two Thousand and no/100 ($2000.00) Dollars, together with the cost of this prosecution, and on the 11th day of November, 1970, on failure to pay fine was sentenced to perform hard labor for the County for 515 days, and an additional term for the cost, at the rate of seventy-five cents per day, and as additional punishment imposed the defendant was sentenced to perform hard labor for the County for 12 months, from which sentence the said Chester E. McKinney has this day prayed and obtained an appeal to the Court of Criminal Appeals of Alabama.

NOW, IF THE SAID Chester E. McKinney shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the appeal is dismissed, the said Chester E. McKinney shall

surrender himself to the Sheriff of Jefferson County, at the County Jail, within fifteen days from the date of such affirmation or dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

Given under our hands and seals, this the 11th day of November, 1970.

Approved:

Julian Swift (sig)
Clerk of the Circuit
Court of Jefferson
County.

Chester E. McKinney (L.S.)
Salem E. Ritchey (L.S.)
George Ritchey (L.S.)
Edna Ritchey (L.S.)
By Ferris S. Ritchey, Jr. (L.S.)
Atty. in Fact

CITATION OF APPEAL TO COURT OF CRIMINAL APPEALS OF ALABAMA

THE STATE OF ALABAMA) (CIRCUIT COURT

JEFFERSON COUNTY) (TENTH JUDICIAL CIRCUIT OF ALABAMA

To McDonald Gallion, Atty. General State of Alabama

Montgomery, Alabama Greeting:

Whereas, Chester McKinney has taken an appeal from the judgment by the Circuit Court of the Tenth Judicial Circuit of Alabama, for the County of Jefferson, State of Alabama, in the cause wherein State of Alabama is Plaintiff, and Chester McKinney is Defendant.

Now, you are, therefore, cited to appear at the Present Term, 1970, of the Court of Criminal Appeals of Alabama, to defend on said appeal, if you shall think proper to do so.

Witness my hand, this 7th day of Dec. 1970.

Julian Swift (sig)
Clerk Circuit Court.

Serve on McDonald Gallion, Atty. General, State of Alabama, Montgomery, Alabama

Received in Office DEC 8, 1970-M.S. Butler, Sheriff.

Executed by serving a copy of the within McDonald Gallion.

This the 9 day of Dec. 1970. M. S. Butler, Sheriff Montgomery County By W. L. Mason, Deputy Sheriff.

M.S. Butler, Sheriff of Montgomery County, Alabama, Claim $1.50 each for serving 1 process and $1.00 travel expense on each of 1 process or a total of $2.50. W. L. Mason, Deputy Sheriff.

(Filed in Office Dec. 15, 1970)

MOTION FOR NEW TRIAL

Comes the Defendant in the above styled cause and moves the Court to set aside the verdict of the jury and the judgment and sentence of the Court heretofore rendered in this cause and to grant unto the Defendant a new trial, and as grounds for said motion the Defendant sets out and assigns the following, separately and severally:

1. The verdict of the jury is contrary to the great preponderance of the evidence adduced upon the trial of this cause.

2. The verdict of the jury is not sustained by the preponderance of the evidence.

3. The judgment of the Court is not sustained by the great preponderance of the evidence.

4. The verdict of the jury and the judgment of the Court are not sustained by the great preponderance of the evidence.

5. The verdict of the jury is contrary to law.

6. The judgment and sentence of the Court are contrary to law.

7. The verdict of the jury is contrary to the evidence.

8. The judgment and sentence of the Court are contrary to the evidence.

9. The verdict of the jury is not supported by the evidence.

10. The judgment and sentence of the Court is not supported by the evidence.

11. The evidence in this case is insufficient to support the verdict of the jury.

12. The evidence in this case is insufficient to support the judgment and sentence of the Court.

13. The Court erred in not granting Defendant's motion for a continuance in this cause.

14. The Court erred in not granting attorney Ferris S. Ritchey, Jr.'s motion to withdraw as attorney for the Defendant in this cause.

15. The Court erred in not granting Defendant's motion a twenty-four (24) hour continuance in this cause when it became known to the Court that on the day of Defendant's trial, his attorney, Robert Eugene Smith, could not be present because he had to argue the case, United States of America

Vs. Book Bend, Docket 58, October Session, 1970 before the Supreme Court of the United States in Washington, D. C.

16. The Court erred in denying Defendant his Sixth Amendment right to have an attorney of his choice to defend him in this cause.

17. The Court erred in refusing to permit the attorney employed by the Defendant to represent him during the trial of this cause.

18. The Court erred in overruling the Motion to Quash the Solicitor's Complaint filed by the Defendant in this cause.

19. The Court erred in overruling the Demurrer to the Solicitor's Complaint filed by the Defendant in this cause.

20. The Court erred in allowing over the objection of the Defendant the following answer of Charles H. Barnes, witness for the State, in response to the question:

"Q. And at the time you talked to him, what did you do at the time you were talking to him, if anything? A. I identified myself to Chester McKinney and served him with notice that several magazines and publications had been judicially declared obscene in various state courts in Alabama."

21. The Court erred in its rulings upon the admissibility of State's Exhibit "A" offered by the State, and in allowing the said exhibit to go to the jury over the Defendant's objection.

22. The Court erred in its rulings upon the admissibility of State's Exhibit "B" offered by the State, and in allowing the said exhibit to go to the jury over the Defendant's objection.

23. The Court erred in its rulings upon the admissibility of State's Exhibit "D" offered by the State, and in allowing the said exhibit to go to the jury over the Defendant's objection.

24. The Court erred in sustaining the objection of the State to the following question propounded by the Defendant to Charles H. Barnes, a State's witness, on cross-examination:

"Q. I will ask you if at anytime, to your knowledge through the auspices of your office, there was any attempt made to have this magazine, "New Dimensions", Volume 16, No. 4, Volume 4 (sic) declared to be obscene by a judge in this circuit?"

25. The Court erred in overruling the Defendant's motion to exclude the State's evidence at the conclusion of the State's evidence in chief.

26. The Court erred in refusing to give at the request of the Defendant, before the jury retired, the oral charge that in order for the jury to find the Defendant guilty in this cause, the State statute under which he was being tried had to reflect a specific and limited concern for juveniles.

27. The Court erred in refusing to give at the request of the Defendant, before the jury retired, the oral charge that in order for the jury to find the Defendant guilty in this cause there must have been evidence of the sort of pandering proscribed by the Supreme Court of the United States in Ginzburg v. United States, 363 U. S. 304 (1966).

28. The Court erred in refusing to give at the request of the Defendant, before the jury retired, the oral charge that in order for the jury to find the Defendant guilty in this cause there must have been evidence that the magazine "New Directions", Number 16, Volume 4, No. 4 was sold by the Defendant in a manner so obtrusive as to be an assault upon individual privacy in a manner to make it impossible for an unwilling individual to avoid exposure to the publication.

29. The Court erred in overruling the Defendant's objections to certain prejudicial remarks made by Charles H. Barnes, witness for the State, during the course of the trial, to-wit: when in reply to a question from the State's attorney, as to his assignment by the State, the witness replied, "the assignment of doing something about pornography in Alabama."

30. The Court erred in overruling and refusing to grant the Defendant's motion for a mistrial, after Charles H. Barnes, witness for the State, made his reply, "the assignment of doing something about pornography in Alabama".

31. The cumulative effect of repeated and persistent efforts of the attorneys representing the State of Alabama throughout the course of this trial to inject incompetent, improper, and prejudicial matters into the trial was such as to deny this Defendant a fair and impartial trial.

31. The verdict of the jury was influenced by the cumulative effect of repeated and persistent incompetent and prejudicial remarks, statements, question, and argument by the attorneys representing the State of Alabama in this cause.

32. The Court erred in refusing to give Charge 2 requested by the Defendant in writing before the jury retired and in endorsing thereon before the jury retired the word "refused", which in words and figures is as follows:

–2–

"I charge you, ladies and gentlemen of the jury, that the Prosecution must introduce evidence of community standards, either that the alleged obscene material appealed to prurient interests or offended contemporary standards of decency, and that if the Prosecution failed to introduce any evidence of community standards, you cannot find the Defendant guilty."

33. The Court erred in refusing to give Charge 3 requested by the Defendant in writing before the jury retired and in endorsing thereon before the jury retired the word "refused", which in words and figures is as follows:

–3–

"I charge you, ladies and gentlemen of the jury, that you do not have the prerogative of imposing your own personal standards as the test of criminality of conduct, and that you do not necessarily express or reflect community standards, and that proof of community standards is a necessary prerequisite to conviction of this Defendant."

34. The Court erred in refusing to give Charge 4 requested by the Defendant in writing before the jury retired and in endorsing thereon before the jury retired the word "refused", which in words and figures is as follows:

–4–

"The Court charges the jury that unless the Prosecution introduced evidence that according to or applying contemporary community standards, the dominant theme of the magazine in question appealed to the prurient interests of the reader, or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters, you cannot find this Defendant guilty."

35. The Court erred in refusing to give Charge 5 requested by the Defendant in writing before the jury retired and in endorsing thereon before the jury retired the word "refused", which in words and figures is as follows:

–5–

"The Court charges the jury that unless the Prosecution has introduced evidence to prove that the magazine, "New

Directions Number 16 Volume 4 Number 4" to be utterly without redeeming social value, you cannot find this Defendant guilty."

36. The Court erred in refusing to give Charge 6 requested by the Defendant in writing before the jury retired and in endorsing thereon before the jury retired the word "refused", which in words and figures as follows:

—6—

"The Court charges the jury that a guilty verdict in an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. The determination of obscenity by this jury cannot be on the basis of your personal upbringing or restricted reflection of the particular experience of life, but on the basis of "contemporary community standards which must be established by relevant evidence during the trial". The Court charges the jury that unless these standards have been so established by relevant evidence during the trial, you cannot find this Defendant guilty."

37. The Court erred in refusing to give Charge 7 requested by the Defendant in writing before the jury retired and in endorsing thereon before the jury retired the word "refused", which in words and figures is as follows:

—7—

"The Court charges the jury that since the Prosecution in the present case had the burden of proving relevant community standards prevailing in the nation generally and elected not to do so, you cannot find this Defendant guilty."

38. The Court erred in refusing to give Charge 8 requested by the Defendant in writing before the jury retired and in endorsing thereon before the jury retired the word "refused", which in words and figures is as follows:

—8—

"The Court charges the jury that if you believe from the evidence that the magazine entitled "New Directions Number 16 Volume 4 Number 4" was sold to willing adults in an adults only environment, i.e., "adults only bookstore" and not pandered or foisted upon an individual wishing to avoid confrontation with it and not disseminated to juveniles, you cannot find this Defendant guilty."

39. The verdict of the jury clearly indicates that it was rendered by mistake, bias, passion, or prejudice.

40. The Court erred in overruling the Defendant's motion to exclude all of the State's evidence.

41. The Defendant was prejudiced by pre-trial publicity which affected the jury's verdict.

42. The Defendant has newly discovered law from recent decisions of the United States Supreme Court which would entitled him to an affirmative charge to the jury.

43. For that the Court committed error to reversal in unduly restricting the argument of the attorney for the Defendant on the trial of said cause.

WHEREFORE, Defendant moves the Court to set aside the verdict of the jury and the judgment of the Court and grant Defendant a new trial.

/s/ FERRIS S. RITCHEY, JR.,
ATTORNEY FOR DEFENDANT

PRESENTED THIS 9 day of December, 1970, and set for hearing before Judge Gibson on the 7 day of January, 1971, at 9:00 A.M. o'clock.

/s/ JOSEPH J. JASPER,
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of December, 1970, served a copy of the above and foregoing Motion on the Honorable Earl Morgan, District Attorney of the Tenth Judicial Circuit of Alabama.

/s/ FERRIS S. RITCHEY, JR.,
ATTORNEY FOR DEFENDANT

Filed in open Court December 9, 1970

Julian Swift, Clerk"

This 7th day of January, 1971, this motion is passed to January 15, 1971.

This 15th day of January, 1971, this motion is passed to January 29, 1971.

This 29th day of January, 1971, this motion being submitted to the Court and the same being duly considered and understood by the Court, it is ordered and adjudged by the Court that this motion be and the same is hereby overruled, to which action of the Court, the defendant hereby duly and legally excepts.

NOTICE TO COURT OF CRIMINAL APPEAL OF ALABAMA

STATE OF ALABAMA) IN THE CIRCUIT COURT OF THE

JEFFERSON COUNTY) TENTH JUDICIAL CIRCUIT OF ALABAMA

CLERK OF COURT OF CRIMINAL APPEALS OF ALABAMA

IN RE: CHESTER McKINNEY
CIRCUIT COURT NO. 20948

As Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, I hereby certify that the following order appears of record in this Court:

"1-29-71 Motion for new trial overruled. Gibson, Judge."

Witness my hand and seal of this Court, this the 2nd day of February, 1971.

Julian Swift (sig) (SEAL)
Clerk of the Circuit Court of
the Tenth Judicial Circuit
of Alabama

CERTIFICATE OF CLERK

I, Julian Swift, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, in and for said County and State, do hereby certify that the foregoing pages numbered from 1 to 130, both inclusive, contain a full, true, correct and complete transcript of all proceedings in this Court; that pages numbered from 20 to 117, both inclusive, contain a transcript of evidence including objections, oral motions, rulings of the Court and oral charge of the Court, as filed in this office; except State's exhibit B, "New Directions", a magazine, which is impracticable to attach as a page to this transcript, and is

therefore transmitted under separate cover and made a part of this transcript, as provided by Rule 41 as amended August, 1968, of the Supreme Court Rules of Alabama; all being in a cause wherein the State of Alabama is plaintiff and Chester McKinney is defendant, Circuit Court No. 20948, which said cause was tried and determined in this Court on the 10th day of November, 1970, and on the 11th day of November, 1970, said defendant gave notice of appeal from the judgment therein to the Court of Criminal Appeals of Alabama.

Witness my hand and the seal of this Court, this the 13th day of May, 1970.

/s/ Julian Swift,
Clerk of the Circuit Court of
the Tenth Judicial Circuit
of Alabama.

Supreme Court, U. S.
FILED
DEC 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-532

CHESTER McKINNEY,

Petitioner

versus

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND APPENDIX

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH G. L. MARSTON, III
Assistant Attorney General

CHARLES N. PARNELL, III
Assistant Attorney General

COUNSEL FOR RESPONDENT

SUBJECT INDEX

	Page
TABLE OF CASES	ii
TABLE OF CONSTITUTIONAL PROVISIONS	iii
TABLE OF STATUTES	iii
OPINIONS OF COURTS BELOW	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	6
CONCLUSION	15
APPENDIX	17
CERTIFICATE OF SERVICE	28

TABLE OF CASES

Page

Ballew v. State,
—— Ala. ——, 296 So. 2d 206 (1974) ——— 7

Bush v. Tuscaloosa,
50 Ala. App. 44, 276 So. 2d 629 (1973) ——— 7

Hamling v. United States,
—— U. S. ——, 41 L. Ed. 2d 59, 94 S. Ct. ——
(1974) ——— 8, 9, 11

McKinney v. State,
—— Ala. ——, 296 So. 2d 228 (1974) ——— 3, 10, 11

McKinney v. Tuscaloosa,
49 Ala. App. 21, 268 So. 2d 488 (1972) ——— 7

Miller v. California,
413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607
(1973) ——— 6, 7, 10, 11, 14

Smith v. California,
361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215
(1959) ——— 11

Stanley v. Georgia,
394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243
(1969) ——— 13

Visual Educators Inc. v. Koepel
289 Ala. 410, 268 So. 2d 22 (1972) ——— 7

TABLE OF CONSTITUTIONAL PROVISIONS

Page

First Amendment to the Constitution of the United States ——— 3

Fourteenth Amendment to the Constitution of the United States ——— 3

TABLE OF STATUTES

Page

Act No. 856, Acts of Alabama 1961 ——— 7, 12, 18
(Unofficially compiled as Code of Alabama 1940, Title 14, Section 374(1)—(12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-532

CHESTER McKINNEY,

Petitioner

versus

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURTS BELOW

The memorandum of the Court of Criminal Appeals of Alabama, affirming the Petitioner's conviction without opinion, is not reported.

The order and opinion of the Supreme Court of Alabama affirming the Petitioner's conviction are reported as follows: *McKinney v. State,* —— Ala. ——, 296 So. 2d 228 (1974).

II

QUESTIONS PRESENTED

A.

Is an individual denied due process of law when he is prosecuted and convicted under a state statute outlawing obscenity where he is convicted under a construction of the statute defining "obscenity" in accordance with the pre-*Miller* standards and where state appellate courts reviewed said conviction in light of the *Miller* standards?

B.

May a party complain of a deprivation of his constitutional rights to both a fair trial and due process because a statute, requiring that he have prior knowledge that the pornographic material he is offering for sale has been declared judicially obscene under a procedure established by the statute before he may be prosecuted under said statute, deprives him of his right to confrontation?

C.

May a party who is convicted of selling an obscene publication complain that he lacked *scienter* of the nature of the publication, where the evidence shows that he was previously informed by officials and by letter that the

publication had been judicially declared obscene, and that the sale took place following the warning?

D.

Where a party engages in the regular business of selling publications which violate or approach violating the criminal statutes relating to obscenity and for that reason the party charges his customers higher prices than are charged by other business for publications of similar size and quality which do not approach a violation of the law, may such a party challenge a criminal conviction growing out his business on the grounds that he did not realize the publication in point was obscene?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States.

Act No. 856, 1961 Regular Session of the Alabama Legislature. Acts of Alabama, Regular-Special Sessions, 1961, Vol. II, pages 1310-1316. (Appendix A).

IV.

STATEMENT OF THE CASE

The Alabama Supreme Court stated the case and the facts as follows:

> "This is a pornography case involving the sale of a magazine entitled "New Directions" after it had been judicially found to be obscene.

" 'New Directions' is published in North Hollywood, California by Jaybird Enterprises, Inc. The masthead states that it is a 'cultural, scientific, educational, and sociological publication produced and distributed to illuminate the conviction that the unclothed human body is worthy of respect and deserving of increased acceptance in our culture . . . . Subscription rates, $14.00 per year. Second-class postage paid in North Hollywood, California.' A review of its pictures contained in the magazine introduced into evidence as an exhibit reveal photographs of nude men and women exposing their genital organs in a revolting manner; male kissing female body near her genital organ; females shown with their legs spread-eagle apart exposing their genital organs; male kissing the female breast; male sitting over female with his genital organ touching her mouth, and many more similar poses—the magazine contains 61 pages in all. After review of pictures of these grotesque nudes, a person of reasonable sensibilities will conclude that it is no wonder God made man and woman to wear clothes. Without them some are the most unattractive animals in His kingdom.

" 'New Directions' was one of a number of magazines declared to be obscene in a decree rendered by the Circuit Court of Mobile County on February 26, 1970, in an action styled, State of Alabama, ex rel Attorney General of Alabama, ex rel District Attorney of the 13th Judicial Circuit of Alabama v. The Magazine, 'Jaybird U. S. A.', No. 16, Vol. 4, No. 4; The Magazine, 'New Directions', No. 14, Vol. 4, et al., Case Number 76399. Each of the magazines was determined to be mailable matter and each was declared to be contraband. There appears to be a typographical error in the style of the

case which refers to No. 14, Vol. 4 of 'New Directions'. The decree refers to No. 16, Vol. 4, No. 4.

"On March 10, 1970, a State attorney accompanied by a State investigator, went to the Paris Bookstall, Birmingham, Alabama, a place of business operated by McKinney, and personally delivered a letter to McKinney informing him that 'New Directions' had been judicially declared to be obscene. On March 31, 1970, these officers returned to the Paris Bookstall and purchased the magazine, 'New Directions' from McKinney. While there, and with McKinney looking on, and in the presence of the investigator, the State attorney 'flipped' through the pages of the magazine. Afterwards, they left, and the investigator signed a complaint charging McKinney with violating Title 14, §374(4), Code of Alabama 1940, Recompiled 1958, by selling obscene material which had been judicially declared to be obscene. McKinney was convicted in a trial before a jury and was given the maximum sentence under the statute. Before retiring, the jury was charged by the court that the only issue of fact for them to decide involved the question of selling material judicially declared obscene as charged in the complaint.

"McKinney appealed his conviction to the Court of Criminal Appeals. The appellate court affirmed the trial court without rendering an opinion. Upon his application for rehearing being denied, McKinney filed a petition for certiorari, alleging deprivation of constitutional rights; that this was a case of first impression. We granted certiorari.

"Neither McKinney nor the State introduced evidence in the trial on the question of obscenity, vel non.

McKinney raised that issue in a motion to quash the complaint which the trial judge overruled. A motion to exclude the evidence was also overruled by the trial court. The validity of the judgment of the Mobile Circuit Court was questioned by McKinney on objection to its introduction in evidence, first in the sense that he was not a party to the action, second that the State had to prove by affirmative evidence that the subject magazine was obscene in this trial.

"The action in the Mobile Circuit Court was filed pursuant to the provisions of Act No. 856, § 5 through § 11, Acts of Alabama 1961, Vol. II. The court acting as trier of fact found the magazines to be obscene. The 1961 Act defnes obscene to mean 'lewd, lascivious, filthy and pornographic and *that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.*'" (Emphasis added.)

The Supreme Court of Alabama affirmed the Petitioner's conviction on May 9, 1974. *McKinney v. State*, —— Ala. ——, 296 So. 2d 228 (1974).

V.

ARGUMENT

A.

The Petitioner argues at length that he was denied due process because the state courts had previously construed the Act in question to outlaw obscenity as defined prior to *Miller v. California* (413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 [1973]), but, that although he was tried under

the pre-*Miller* definition, his appeal was decided under the *Miller* standards. There are several serious difficulties with the Petitioner's arguments.

First, "obscenity" under the Act in question, Appendix "A", had never been construed or defined prior to the Petitioner's case. *Visual Educators Inc. v. Koeppel*, (289 Ala. 410, 268 So. 2d 22 [1972]) cited by the petitioner, did not concern the Act but rather concerned the general public policy relating to obscenity. Only two cases appear to have been decided under the Act prior to *Miller*. These were: *McKinney v. Tuscaloosa*, 49 Ala. App. 21, 268 So. 2d 488 (1972) and *Bush v. Tuscaloosa*, 50 Ala. App. 44, 276 So. 2d 629 (1973), the latter being decided about three months before *Miller*. Both cases were reversed on procedural grounds and required no application of any definition of "obscenity" to the materials involved. Therefore, the Petitioner cannot complain that the definition of obscenity was changed; prior to *Miller* the Alabama Courts had not construed "obscenity" under the Act. And, when it was construed, the State Courts appropriately followed *Miller*.

The second difficulty with the Petitioner's argument is that he was tried and convicted under the pre-*Miller* definition. The pre-*Miller* standards were considerably more liberal that the *Miller* standards. If "New Directions", No. 16, Vol. 4, No. 4, presented some weird case of a publication which could be outlawed prior to *Miller*, but not under *Miller*, the Petitioner might have an argument. However, Chief Justice Heflin's concurring opinion in the case of *Ballew v. State*, —— Ala. ——, 296 So. 2d 206 (1974), indicated that the Court kept an eye on both sets of standards in deciding these cases.

The third difficulty with the Petitioner's argument is

that it has been decided against him in *Hamling v. United States*, —— U. S. ——, 41 L. Ed. 2d 590, 94 S. Ct. —— (1974).

B.

Petitioner next argues he was deprived of his constitutional rights to a fair trial, due process and confrontation because the obscenity of the magazine was not tried and proven during his trial. Rather, it was established by the State that the magazine had been declared judicially obscene by a court of appropriate jurisdiction in Alabama, that Petitioner was personally handed a letter informing him of the judicial declaration, and that after such knowledge Petitioner sold the publication three weeks later.

After the status of the res (the obscenity of the publication involved herein) was established, was it necessary to prove the magazine's obscenity again? Surely not. The statute Petitioner violated makes it illegal to, among many other things, sell obscene printed matter known by the seller to have been judicially declared obscene. This is perhaps a kind of statute of first impression to this Honorable Court. It does not, like so many statutes, attempt to make it illegal to sell obscene matter with scienter. Rather it eliminates the guesswork on the part of dealers in obscene publications by putting the determination of obscenity of a particular publication in a civil proceeding. In such a scheme of things the dealer has full and fair warning of what the State will or will not allow him to sell within obscenity guidelines.

It is not the mere selling of obscene matter that this statute makes criminal, but the selling of obscene matter with knowledge of its contents and *with knowledge that it has been declared judicially obscene*. (Emphasis supplied).

By the words of the statute itself, the obscenity of the publication need not be proven.

Obscenity, as a legal term, is not capable of being said to exist in degrees. Either a publication is obscene, or it is not.

> "The definition of obscenity, however is not a question of fact, but one of law; the word 'obscene,' as used in 18 U. S. C., § 1461 [18 U. S. C. A., § 1461], is not merely a generic or descriptive term, but a legal term of art."
>
> *Hamlin v. United States*, —— U. S. ——, 41 L. Ed. 2d 590, 94 S. Ct. —— (1974).

In this case, obscenity was a question of law—a question decided by a court and answered by deciding that the magazine, the basis of this prosecution, was indeed obscene. Therefore, it was not a question of fact necessary to be proven at Petitioner's trial.

The process is analagous to a charge of assault with a deadly weapon when the assault is perpetrated by the use of a gun, knife, club, etc. The fact that these "weapons" are deadly is not a question of fact, but of law. The law takes notice of the fact that such weapons can indeed kill a person. Therefore, in such a prosecution it is not necessary to prove such a weapon is a deadly weapon. Likewise, in the case at bar, there was no question of fact, but one of law previously decided against Petitioner.

Petitioner argues the statute deprives him of his right to confrontation. Admittedly, Petitioner was not a party to the civil action wherein the magazine was judicially declared obscene. However, as the Supreme Court of Alabama pointed

out in its decision affirming Petitioner's conviction, there are constitutional safeguards provided.

> "Constitutional safeguards are provided in the Act for one charged with violating its provisions. Section 5 provides for the institution of proceedings for an adjudication in a Circuit Court. (While this section provides that the action shall be filed in a Court of Equity, under the Rules of Civil Procedure adopted by this court on July 3, 1973, there is now only one form of action known as a "Civil Action". Rule 2, Rules of Civil Procedure.) Section 6 of this Act provides the type of complaint to be filed and the allegations which the complaint shall contain. Section 7 provides that an order to show cause shall be issued and service of same, upon the res and the person charged. Section 8 gives the respondent the opportunity to file defensive pleadings and permits answer by amicus curiae. Section 9 provides for maximum promptness of the hearing commensurate with constitutional requirements, including due process, freedom of the press, and freedom of speech. The burden is on the State to prove obscenity, vel non, in the adjudication of same."

Petitioner argues strenuously that the Act under which he was convicted was unconstitutional—void for vagueness. In speaking to this point in *Miller*, supra, Chief Justice Burger stated:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe potently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific

> prerequisites provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See *Roth v. United States*, supra, 491-492, 1 L. Ed. 2d 1498. Cp. *Ginsbcrs v. New York*, 390 U. S., at 643, 20 L. Ed. 2d 195."

In reading this part of that opinion, one can see that the concern of this Court is "fair notice" to a dealer in dirty books. These particular words quoted above point to a statute criminalizing only the sale of obscene matter, not the sale of obscene matter with knowledge of its judicial declaration of obscenity. What better "fair notice" can be instituted than that established in the Act involved in the case at bar? The Supreme Court of Alabama mentioned in its opinion affirming Petitioner's conviction, *McKinney v. State*, —— Ala. ——, 296 So. 2d 228 (1974), a notable part of Justice Douglas' dissent in *Miller*, supra.

> "'If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific.'" 37 L. Ed. 2d 419, at 441-442.

Furthermore, most of these same arguments were put forward in *Hamling v. United States, (supra)* and were decided contrary to Petitioner's claim.

Petitioner also argues that during his trial it was never shown he had knowledge of the contents of the material he distributed. He relies on the case of *Smith v. California*, 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959) for his proposition. However, there is a very important and distinct difference in the Alabama statute involved in the case at bar and the California statute invalidated in that case.

The California statute sought to make the proprietor of a bookstore absolutely liable criminally for the mere possession in his store of a book *later* judicially determined to be obscene. This procedure is completely the reverse of the procedure Alabama has established in Title 14, Section 374, Code of Alabama 1940. As stated above, Alabama's statute requires a judicial determination of obscenity, communication personally to the individual sought later to be held liable, and then finally, the sale of that publication.

In reply to this argument this writer would first suggest again such a statement is directed toward a statute criminalizing the mere sale of obscene matter. It has already been clearly shown the Alabama statute involved in the case at bar is not such a statute, but also requires the knowledge of the fact the publication has been judicially declared obscene.

Additionally, one must consider the facts in this case. Petitioner was personally informed the magazine "New Directions" had been declared judicially obscene. This alone should be sufficient to make a dealer in pornographic materials curious enough to inspect the magazine in order to determine its contents. But more importantly, would not such a warning in and of itself sufficiently put him on notice, and provide on his part the requisite knowledge of the nature and character of the magazine?

In this writer's opinion there could be no better assurance of such knowledge. It is important to note that in the case at bar, Petitioner had three weeks from the time he was informed of the judicial declaration of obscenity to the time of the sale made the basis of his prosecution to inspect the magazine, consider its contents to determine if he wished to challenge the obscenity decree, and if not, clear it from his

shelves. It seems he decided he would ignore the decree, and by such reckless disregard and utter contempt of the law attempt to plead he did not have knowledge of the nature and contents of the magazine.

C.

The Petitioner's arguments on *scienter* appear to disregard the fact that he was formally warned of the judicial determination of the obscenity of "New Directions", No. 16 Vol. 4, No. 4, prior to the sale out of which his conviction grew. This petitioner can hardly claim that he lacked *scienter*. He was officially warned in writing that "New Directions", No. 16, Vol. 4, No. 4 had been declared judicially obscene. The Petitioner did nothing about the warning and three weeks later sold the magazine which forms the basis of this prosecution.

D.

The petitioner was not convicted for preaching unpopular political ideas. Nor, is he a religious or phylosophical dissenter. He has not been convicted for engaging in discussion or dissemination of his ideas. Rather, he was, to put it bluntly, the operator of a "dirty book" store.

One theme which runs throughout our law is that different standards apply to the individual who does something gratuitously than apply to the businessman who does the same thing for profit. This distinction has been recognized in the area of expression. In *Stanley v. Georgia*, (394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 [1969]), this Honorable Court ruled that a state may not outlaw the private possession of obscene matter. *Stanley* was cited with approval

in *Miller v. California* (413 U. S. 15, 19, 37 L. Ed. 2d 419, 427, 93 S. Ct. 2607 [1973]). Yet, further on in *Miller*, the Majority makes this observation;

> "The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a misuse of the great guarantees of free speech and free press. . . . Breard v Alexandria, 341 US, at 645, 95 L Ed 1233, 35 ALR2d 335. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people, Roth v United States, supra, at 484, 1 L Ed 2d 1498 (emphasis added). See Kois v Wisconsin, 408 US, at 230-232, 33 L Ed 2d 312; Thornhill v Alabama, 310 US, at 101-102, 83 L Ed 1093. But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain is a different matter. [footnote omitted] 413 U. S. 15, 34-35, 37 L. Ed. 2d 419, 437.

Therefore, there is established a distinction between the person who engages expression, even of an obscene nature, privately and gratuitously and the businessman who engages in the sale of commercial obscenity.

In the instant case, the evidence shows that the petitioner operated an "Adult Book Store." Such stores have sprung

up across the land. These businesses are dedicated to the sale of commercial materials of an erotic nature. These materials are outlandishly expensive, often times costing many times the price of similar publications which are not erotic in nature. Since it costs no more to reproduce erotic materials than it does to reproduce great works of art of a similar size and quality, and, from all reports, business is excellent, it must be assumed that the high prices are designed to compensate the businessman for the risks he runs in selling the stuff. To permit such an individual to avoid these risks by embracing an Amendment designed to protect intellectual dissent and discussion is pointless.

CONCLUSION

In conclusion, the Respondent, the State of Alabama, respectfully submits that the decision of the Supreme Court of Alabama is correct and that the writ of certiorari ought to be denied and prays such denial.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH G. L. MARSTON, III
Assistant Attorney General

CHARLES N. PARNELL, III
Assistant Attorney General

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104
COUNSEL FOR RESPONDENT

APPENDIX

APPENDIX A

ACTS OF ALABAMA, 1961, Regular-Special Sessions,
Vol. II, Pages 1310-1316.

ACT No. 856.

Act No. 856

AN ACT

To supress traffic in obscene publications, defining terms, prescribing penalties, and providing enforcement procedures against residents or non-residents.

Be It Enacted by the Legislature of Alabama:

Section 1. TITLE. This Act shall be known as the Alabama Law on Obscenity and may be referred to by that designation.

Section 2. PURPOSE AND INTENT OF ACT. The spread of obscene publications, during the past several years, has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against such publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within this State.

Section 3. DEFINITIONS. The following words, terms and phrases used in this Act shall, for the purpose of this Act, have the meaning respectively ascribed to them in this Section:

"Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious, scientific or educational institution.

Section 4. CRIMINAL PROVISIONS AND PENALTIES.

(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, sells, exhibits or commerically distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than Two Thousand Dollars for each offense, or be both so imprisoned and fined in the discretion of the Court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than Five Hundred Dollars for each offense, or be both so imprisoned and fined in the discretion of the Court.

Section 5. MAILABLE MATTER; COMMENCEMENT OF ACTION. Whenever the Solicitor for any Judicial Circuit or County Solicitor has reasonable cause to believe than any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is (2) in this State, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the Solicitor for the Judicial Circuit or County into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action In Equity in the Circuit Court of any Court having Equity jurisdiction of the affected County for an adjudication of the obscenity of the mailable matter.

Section 6. ACTION TO DECLARE MAILABLE MATTER OBSCENE. The action authorized by Section 5 shall be commenced by the filing of a complaint to which shall be

attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as Respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution, and of any person in this State preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; and

(f) pray for its surrender, seizure and destruction.

Section 7. ORDER TO SHOW CAUSE. Upon filing of the complaint, described in Section 6, the Solicitor or Register of the Court shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the Court shall dismiss the complaint. If the Court finds probable cause to believe such matter to be obscene it may forthwith

issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the Respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order may be made in any manner provided by law and, in case of mailable matter published or edited outside the Statt of Alabama and of any nonresident Respondent, by registered or certified mail directed to the mailable matter or the Respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such order upon the mailable matter of any Respondent for the purposes of this Section.

Section 8. APPEARANCE, ANSWER AND TRIAL DATE.

(1) On or before the return date specified in the order to show cause, the mailable matter and each Respondent may appear and file defensive pleadings.

(2) The Court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer

and other defenses by the mailable matter and other Respondents, the Court shall set a date for the trial of the case.

Section 9. PUBLIC POLICY, PROCEDURE. The public interest requires that all actions prescribed by this Act, other than criminal actions under Section 4, be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The Rules of Civil Procedure pertaining to Equity cases shall be applicable to the trial of such actions except that the time limits therein concerning notice of trial, the presentation of evidence and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the Court finds the same to be in the public interest.

Section 10. DECREE. In the event the Court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any Respondent, prohibiting him from doing or continuing to do any thing condemned by this Act;

(b) direct any resident Respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the Court may find to be reasonable;

(c) direct all Sheriffs in the State to seize and destroy all such obscene mailable matter in the possession or under the control of any Respondent who shall fail to comply with the Court's orders;

(d) enter any other and appropriate orders to effectuate the decree or injunction.

Section 11. INJUNCTION. Every order granting an injunction shall set forth the reason for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the Respondents, to the action and upon those persons in active concert or participation by contract or arrangement with such Respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the Court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all Respondents named in the complaint and in the manner as provided in Section 7 of this Act.

Section 12. WHEN MAILABLE MATTER IS NOT EXEMPT. Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this State for sale or commercial distribution, or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of Section 4 of this Act.

Section 13. CONTEMPT. Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to Sections 10 and 11 of this Act, and who shall disobey any of the provisions thereof, shall be guilty of contempt of Court.

Section 14. EXTRADITION. In all cases in which a Court has entered its decree pursuant to Section 10 that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a Respondent to such decree, who cannot be found in this State, the Governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found pursuant to the laws of this State.

Section 15. PRESUMPTIONS. The possession of any three of the things enumerated in Section 4 of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor.

Section 16. NON-RESIDENTS, JURISDICTION, PROCESS, CONSENT. In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside of this State, it is the purpose of this Section to subject to the jurisdiction of the Court of this State those persons, including non-residents, who are responsible for the importation of such matter into this State and, by such act, submit themselves to the jurisdiction of the Court of this State and any action authorized by Section 5 of this Act.

Section 17. SEVERABILITY. If any provision, clause, sentence, paragraph, section, phrase or part of this Act, or the application thereof to any person or circumstance, is held

invalid, the invalidity shall not affect any other provisions, clauses, sentences, paragraphs, sections, phrases, parts or applications of this Act which can be given effect without the invalid provision, clause, sentence, paragraph, section, phrase, part or application. To this end the provisions, clauses, sentences, paragraph, sections, phrases or part of this Act are declared to be severable.

Section 18. REPEAL AND SAVINGS CLAUSE. All laws and parts of laws inconsistent or in conflict with this Act are, to the extent of their inconsistency or conflict, hereby repealed. This Section shall not be construed to affect any suits pending or rights existing or any liability or penalty incurred under those laws at the time this Act shall take effect.

Section 19. This Act shall become effective upon its passage, approval by the Governor or its otherwise becoming a law.

Approved September 8, 1961

Time: 1:38 P.M.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General, one of the attorneys for the State of Alabama, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this _____ day of December, 1974, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendix on each of the Attorneys for the Petitioner, by mailing the same to them, first class postage prepaid, in the case of Mr. Ritchey and Air Mail postage pre-paid in the case of the other attorneys, and addressed to them as follows:

Mr. Ferris S. Ritchey, Esq.
Attorney at Law
Suite 405
11 West Ox Moor
Birmingham, Alabama 35209

Mr. Robert Eugene Smith, Esq.
Attorney at Law
641 Equitable Building
Baltimore, Maryland 21203

Mr. Gilbert H. Deitch, Esq.
2005 - One Hundred Colony Sq.
1175 Peachtree Street, N.E.
Atlanta, Georgia 30361

_____

JOSEPH G. L. MARSTON, III
Assistant Attorney General
State of Alabama

Address of Counsel:
Attorney General's Office
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104

Supreme Court, U. S.
FILED
AUG 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975
NO. 74-532

CHESTER MCKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON WRIT OF CERTIOARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

ROBERT EUGENE SMITH, Esq.
GILBERT H. DEITCH, Esq.
2005 One Hundred Colony Square
Atlanta, Georgia 30361

Attorneys for Petitioner.

Of Counsel:
FERRIS S. RITCHEY, JR., Esq.
Birmingham, Alabama 35209

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

INDEX

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 4

STATEMENT 6

SUMMARY OF ARGUMENT 6

ARGUMENT: –

I. 7

II. 10

III. 15

CONCLUSION 22

TABLE OF CITATIONS

Cases

Calder v. Bull, 3 Dall. 386, 390 22
Connolly v. General Construction Co., 269 U.S. 385, 391 . 21
Davis v. Alaska, 415 U.S. 308 (1974) 9
Dejone v. Oregon, 299 U.S. 353 12,13
Dombroski v. Pfister, 380 U.S. 479 12,13
Douglas v. Alabama, 380 U.S. 415 (1965) 8
Goss v. Lopez, 419 U.S. 565 (1975) 10
Grayned v. City of Rockford, 408 U.S. 104,
108-109 (1972) 20

Page

Hamling v. United States, 418 U.S. 87 (1974) . . . 7,10,11,14
In re Winship, 397 U.S. 358 (1970) 7
Keyishian v. Board of Regents of New York,
385 U.S. 589 12
Kring v. Missouri, 107 U.S. 221, 235 22
Lanzetta v. New Jersey, 306 U.S. 451, 453 21
Memoirs v. Massachusetts, 383 U.S. 413, ... 3,12,16,18
Miller v. California, 413 U.S. 15 3,12,14,15,17
Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) 9
NAACP v. Button, 371 U.S. 415 12,13
Palmer v. City of Euclid, 402 U.S. 544 (1971) 21
Papachristou v. City of Jacksonville, 405 U.S.
156 (1972) 21
Pointer v. Texas, 380 U.S. 400 (1965) 8
Rabe v. Washington, 405 U.S. 313 (1972) 19,21
Ruth v. United States, 354 U.S. 476 (1957) 12
Shelton v. Tucker, 364 U.S. 479 12,13
Speiser v. Randall, 357 U.S. 513 13
Smith v. California, 361 U.S. 147 (1959) 10,13
United States v. Baranski, 484 F.2d 556
(CA-7 1973) 13
United States v. Dellinger, 472 F.2d 340
(CA-7 1972) 13
United States v. Harriss, 347 U.S. 612, 617 20
United States v. Spock, 416 F.2d 165
(CA-1 1969) 13
Vachon v. New Hampshire, 414 U.S. 478 (1974) 8
Visual Educators Inc. v. Koeppell, 268 So.2d
22 (1972) 16
Watkins v. U.S., 354 U.S. 178, 208 (1957) 16
Wright v. State of Georgia, 373 U.S. 284 (1963) 21

Miscellaneous

United States Constitution
Article I
Section 9 21
Section 10 21
First Amendment 2,4
Fifth Amendment 2,4

Page

Sixth Amendment 2,4
Fourteenth Amendment 2,4
United States Code, Title 28, Section 1257(3) 2
Code of Alabama,
Title 14, Section 374 2,4,6,7,10,15,16
Section 374(3) 4
Section 374(4) 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1975
NO. 74-532

CHESTER MCKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON WRIT OF CERTIOARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

OPINION BELOW

The Opinion of the Supreme Court of Alabama is reported at 292 Ala. 484, 296 So.2d 228 (1974).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 9, 1974. On September 4, 1974, Mr. Justice

Powell granted an extension of time within which to file a Petition for Writ of Certiorari to November 3, 1974. The Petition was filed on November 4, 1974 (November 3 falling on a Sunday) and was granted on June 23, 1975. This Court's jurisdiction is invoked under *Title 28 United States Code §1257(3).*

QUESTIONS PRESENTED

1. Whether the provisions of Title 14, Section 374, Code of Alabama, deprived the Petitioner of rights guaranteed him under the *First, Fifth, Sixth,* and *Fourteenth Amendments* to the *United States Constitution* by allowing his conviction while denying him the right to litigate a material element of the offense and by binding him to a prior determination of that opportunity to be heard.

2. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, under a standard for judging *scienter* solely by alleged proof of a general knowledge of the nature and character of the materials involved, and without competent evidence to establish even that Petitioner had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioner of his liberty and property without due process of law, in violation of the *First, Fifth,* and *Fourteenth Amendments.*

3. Whether the provisions of Title 14, Section 374, Code of Alabama, on its face and as construed and applied to authorize the judgments of conviction of Petitioner herein, were, prior to June 21, 1973, unconstitutionally vague, violating the *First, Fifth,* and *Fourteenth Amendments,* because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California,* 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films appeal to the prurient interest of the average person in the nation as a whole, which test this Court labelled "unrealistic;"

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous."

4. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the indictment, trial and convictions of Petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, and where the Government presented no evidence that the publications and film exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed

national community standards and had educational and other social value, violate the free speech and press and due process provisions of the *First, Fifth,* and *Fourteenth Amendments.*

5. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications named in the indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the *First, Fifth,* and *Fourteenth Amendments.*

6. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs* and *Miller* tests by the Supreme Court abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen construction of the provisions of the statute, all in violation of the guarantees of the *First, Fifth,* and *Fourteenth Amendments* and *Article I,* §9.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 14, Section 374, Code of Alabama are:

"(a) Section 374(3):

" 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying

contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"(b) Section 374(4):

"Importation, sale or possession of obscene printed or written matter; penalties –
"[1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, on in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.
"[2] Every person who, with knowedge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court."

STATEMENT

On March 21, 1970, Petitioner was charged, pursuant to Title 14, Section 374, Code of Alabama, with selling a magazine entitled "New Directions" which had been judicially declared obscene. The magazine was one of several declared to be obscene in a decree rendered by the Circuit Court of Mobile County, Alabama, on February 26, 1970. The Petitioner was not a party to the Mobile County Circuit Court proceedings in which the magazine was declared to be obscene. He had neither notice thereof nor an opportunity to be heard therein.

At Petitioner's trial the State introduced evidence as to the sale of the magazine by Petitioner and, over Defense objections, the outcome of the Mobile County Circuit Court proceedings in which the magazine was found obscene. The trial court instructed the jury that the only issue of fact for their determination was whether or not the Petitioner had sold a magazine judicially declared to be obscene in an action to which he was not a party. The jury found the Petitioner guilty and he was sentenced to a fine of $2,000 and incarceration for a period of one year.

The Alabama Court of Criminal Appeals affirmed Petitioner's conviction without opinion and denied an application for rehearing. The Supreme Court of Alabama, upon a Writ of Certiorari, affirmed the conviction.

SUMMARY OF ARGUMENT

The statute involved herein denies basic due process guarantees by incorporating in a criminal prosecution the results of a prior judicial determination on one of the material

elements of the offense charged. This procedure deprives defendants of the right to litigate that material element of the offense charged, binding them to results from proceedings in which they may not have been involved. The procedure is further defective by failing to require proof of *scienter* to the constitutional minimums established by this Court in *Hamling v. United States*, 418 U.S. 87 (1974).

ARGUMENT

I.

The informities of Title 14, Section 374(4), Code of Alabama, and of the Petitioner's conviction thereunder were clearly pointed out in Chief Justice Heflin's dissent in the Alabama Supreme Court. He stated that:

> "The state has attempted to circumvent the usual criminal process by using a civil judgment as conclusive proof of one essential element of the criminal act . . .
>
> "In the case at bar, the statute operated to deny the defendant his right to a jury trial on the most essential element for which he may be condemned – i.e., the obscenity of the matter sold – and he was denied his right to the protection of the criminal burden of proof. In re Winship, 397 U.S. 358 (1970) ('The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . . ')."

In a recent *per curiam* opinion this Court held that a conviction for willfully contributing to the delinquency of a minor, violated due process because there was no evidence at trial that

the defendant sold the item in question, that he knew it had been sold to a minor, that he authorized such sales to minors, or that he was in the store at the time of the sale. *Vachon v. New Hampshire*, 414 U.S. 478 (1974). This Court held that:

> "This fatal void in the State's case was not filled by appellant's concession at trial that he controlled the premises on July 26. That concession was evidenced at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.
>
> "In these circumstances, the conviction must be reversed. It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process. Harris v. United States, 404 U.S. 1232, 1233, 30 L.Ed.2d 25, 92 S.Ct. 10 (1971). (Chambers opinion of Douglas J.); Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, 80 ALR2d 1355 (1960); Johnson v. Florida, 391 U.S. 596, 20 L.Ed.2d 838, 88 S.Ct. 1713 (1968); see also Adderley v. Florida, 385 U.S. 39, 44, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966)." 414 U.S., at 480.

It is admitted by the State that Petitioner was not a party to the civil proceeding in which the publication which Petitioner was charged with selling was found obscene. Since the decree was conclusive in Petitioner's trial on the issue of obscenity and Petitioner was not allowed to cross-examine the witnesses, if any, proving the magazine was obscene, or the Judge in that action, Petitioner was also denied his right to confront the witnesses against him on that issue. *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965).

This Court recently reaffirmed the right of confrontation in *Davis v. Alaska*, 415 U.S. 308 (1974). Mr. Chief Justice Burger wrote that:

> "We do conclude that the jurors were entitled to have the benefit of the defense before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' Douglas v. Alabama, supra, 380 U.S. at 419, 13 L.Ed.2d 934. The accuracy and truthfulness of Green's testimony was a key element in the State's case against petitioner.
>
> * * *
>
> Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1,3 [16 L.Ed.2d 314, 86 S.Ct. 1245]." Smith v. Illinois, 390 U.S. 129, 131, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968)." 415 U.S., at 317-318.

The procedure authorized by Title 14, Section 374, Code of Alabama, by dispensing with the necessity of proving a material element of the offense, by denying criminal defendants the right to litigate that material element, and by binding such defendants to the results of prior proceedings in which they may not have participated, violates the most basic rudiments of due process. By binding defendants to the results of prior proceedings without assuring that they had notice of such proceedings and an opportunity to participate therein, the procedure violates even those fundamentals of due process held necessary in the civil context. *Mullane v. Central Hanover Bank*,

339 U.S. 306 (1950); *Goss v. Lopez*, 419 U.S. 565 (1975). Petitioner's conviction is thus constitutionally infirm and cannot stand.

II.

Title 14, Section 374, Code of Alabama and the Complaints filed against the Petitioner do not clarify what meaning is attributed to the word "knowingly", nor was "guilty knowledge" proved at the trial. The statute and the Complaints were required to set forth precisely the degree of "guilty knowledge" that a Defendant is required to defend against. Moreover, as we demonstrate hereinafter, actual "guilty knowledge" of the nature, contents, and character of the material is constitutionally required. See *Hamling v. United States*, 418 U.S. 87 (1974).

In *Smith v. California*, 361 U.S. 147 (1959), this Court held that the strict liability feature of the California obscenity law was unconstitutional. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. 160.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute

criminal liability which was condemned by the Court in *Smith v. California*, supra. Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex does not meet the tri-partite knowledge requirements of *Hamling*, supra. Mere proof that a publisher, landlord, or distributor knows that he distributes "Tropic of Cancer", "Lady Chatterley's Lover", "Fanny Hill", "Pleasure is My Business", "Lust Pool", "Shame Agent", "Sin Hooked", "Lust Job", "Sex Life of a Cop", "Solis", etc. in no way establishes, it is submitted, that such publisher or distributor knows the nature, character and contents of those publications. The decision of this Court make this abundantly clear. It is likewise clear that the statute in question herein permits such a strict liability. The problem is further compounded by the statute's and the court's total preclusion of the Petitioner from defending on the issue of obscenity *vel non* at mistrial.

Mr. Justice Rehnquist has defined the requisite criminal knowledge for obscenity convictions: "It is constitutionally sufficient that the prosecution show that a defendant *had knowledge* of the contents of the materials he distributes, *and* that he *knew* the character *and* nature of the materials." *Hamling v. United States*, 418 U.S., at 123 (1974) (emphasis supplied). Even though knowledge of a material's legally obscene status is not required, and thus traditional *scienter* is not required for the class of speech crimes *qua* obscenity crimes (see *Hamling* and *Smith* supra), *actual* knowledge of the contents, nature, and character of the material *is* required for conviction. From *Roth v. United*

States, 354 U.S. 476 (1957), through *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), to *Miller v. California,* 413 U.S. 15 (1973), this Court has been attempting to define what is "obscene" and whether or not the obscenity laws, state or federal, give an accused adequate notice of what is proscribed. If nothing else, seventeen (17) years of constitutional adjudication have indicated that the laws of this country, and its courts, have been somewhat confused. If actual knowledge of the contents, nature, and character of materials is required for a conviction of the substantive offense, then at least that actual knowledge must be *found* before one can be found guilty of violating the law. Thus, the mere showing of a "managership," possession or sale without proof of actual knowledge of the nature, character, and contents of materials is insufficient as a matter of constitutional law to uphold the convictions herein.

First Amendment rights have the highest standards of protection in the American system of jurisprudence, and those rights may only be disturbed when there exists a demanding, overriding, and compelling state interest, and even then such incursions are to be severely limited. *Dombroski v. Pfister,* 380 U.S. 479; *Keyishian v. Board of Regents of New York,* 385 U.S. 589; *Dejone v. Oregon,* 299 U.S. 353. If speech is to be regulated at all, such regulation is to be narrowly drawn so as not to impinge on rights that are properly beyond the sphere of that narrowly conceived area of governmental reguilatin. *NAACP v. Button,* 371 U.S. 415; *Shelton v. Tucker,* 364 U.S. 479. Where statutes on their face or as applied are vague and overbroad, then the chilling effect *Dombroski* warns of rears its ugly head.

There is a lack of Due Process of Law and fundamental fairness when persons cannot be adequately forewarned that

their presumptively lawful activities might someday be used against them in a criminal prosecution. People tend to steer far away from activity that might later be termed "dealing in obscenity" and the chilling effect on protected activity becomes clear. *Speiser v. Randall,* 357 U.S. 513; *NAACP v. Button,* 371 U.S. 415.

In order to avoid self-censorship and a chilling effect on *First Amendment* freedoms, see *Smith v. California,* 361 U.S. 147; *Dombroşki v. Pfister,* 380 U.S. 479, then it is necessary that convictions be based on a *knowing* violation of the law, i.e., a *knowing* sale, distribution or possession with intent to disseminate of *obscene* material *with knowledge* of its contents, nature, and character. See *Hamling,* supra.

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from the free exercise of those rights. "So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski,* supra, at 494. See, *NAACP v. Button,* 371 U.S. 415; *Keyishian v. Board of Regents of New York,* 385 U.S. 389; *Speiser v. Randall,* 357 U.S. 513; *Shelton v. Tucker,* 364 U.S. 479; *DeJonge v. Oregon,* 299 U.S. 353; *United States v. Baranski,* 484 F.2d 556 (CA-7 1973); *United States v. Dellinger,* 472 F.2d 340 (CA-7 1972); *United States v. Spock,* 416 F.2d 165 (CA-1 1969):

> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute

> contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by the burdens of defending prosecutions, however expenditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

Dombroksi, supra, at 490-491.

The obscenity statute here involved, Title 14, Section 374, Code of Alabama, purports to punish the knowing possession, sale or distribution of obscene materials. It does not purport to punish the possession, sale or distribution of books or writings dealing with sex. *Scienter* means guilty knowledge. This means that the prosecution in any obscenity case must charge and prove that the Accused *knew* the contents, nature, and character of the material (see *Hamling*, supra), not merely that the Accused knew that the material dealt with sex.

There can be no question, it is submitted, if the obscenity statute is not to be unconstitutionally applied, that the Complaints must allege this knowledge. Without such allegations, the Complaints are fatally defective, and the convictions and the statute on which they are based are unconstitutional. See *Hamling v. United States*, 418 U.S. 87, (1974); *Miller v. California*, 413 U.S. 15 (1973).

III.

State law as written or authoritatively construed, under which obscene materials are regulated, must comply with the First Amendment standards set forth in *Miller v. California*, 413 U.S. 15. Title 14, Section 374, Code of Alabama as it was written at the time Petitioner was arrested, tried and convicted in these cases, did not comply with the standards set by *Miller*. Nor has that ordinance been "authoritatively construed" to include the *Miller* safeguards. *Miller* says that State statutes which regulate obscene material must be carefully limited. And,

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

And further, that,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard-core" sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California*, supra.

Title 14, Section 374(3), Code of Alabama provides that:

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

Nowhere does this statute regulate the depicting or describing of sexual conduct as required by *Miller*, supra. Nor has this statute ever been "authoritatively construed" to regulate only that specific depiction or description of sexual conduct. For this reason, Title 14, Section 374, Code of Alabama, at the time Petitioner was arrested, tried and convicted, was unconstitutional since it failed to comply with the constitutional standards set out in *Miller v. California.*

Perhaps it can be argued that Title 14, Section 374, Code of Alabama was constitutional in light of the law at the time the Petitioner was arrested. In 1970, perhaps it was constitutional. Now, post-*Miller*, it is not. In *Visual Educators, Inc. v. Koeppell*, 268 So.2d, 22 (1972), the Alabama Supreme Court followed the decisions of this Court in incorporating the *Memoirs* requirements in the application of the State statute in order to make it valid. However, this Court has now abandoned *Memoirs v. Massachusetts*, 383 U.S. 413, (1966), and its tests, in particular the test of "utterly without redeeming social value." However, no member of this Court today supports the *Memoirs* formulation. Without the *Memoirs* test to rely on, Title 14, Section 374 is without support and therefore becomes impermissibly vague for the reasons set out above.

It is the position of Petitioner that the statute under which he has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 (1957).

In *Miller v. California*, 413 U.S. 15, this Court promulgated a new constitutional standard for determining obscenity. Mr. Chief Justice Burger stated that:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., vs. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

Further, Mr. Chief Justice Burger, stated that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials this his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

Miller v. California, supra is the key case in which this Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that this Court undertook to

forumulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when this Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by this Court in *Miller v. California,* supra, as far as specifically designating prohibited material is concerned. This Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and this Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

Clearly, if the provisions of the State statute are limited to press mateials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the State, or if specific hard core sexual conduct has been read into the statute by authoritative judicial construction, the present statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Alabama Legislature to create legislation anew, adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the Courts. Before the appellate courts can so construe, there must exist a constitutionaliy permissible statute with which to work. The present Alabama statute cannot be authoritatively construed to meet the *Miller* test of specificity. Any case, criminal or civil, pending trial or appellate review, based on the present statute which clearly does not contain the *Miller* test of specificity, should be set aside. It is clear that any attempt at authoritative judicial construction by the appellate courts of Alabama incorporating the *Miller* test must fail at this juncture because the statute as written fails to give any person

fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

This Court's per curiam opinion in *Rabe v. Washington,* 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of Law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction punishes one for conduct that was not criminal at the time it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Alabama statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held criminally responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

Just recently this Court reiterated that "(i)t is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined."

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if

> arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on a ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone that if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

2. The Court's failure to strike down the applicable statute as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retroactively, and which will operate precisely like an *ex post facto* law. All those actions done before this Court's announcement of new standards and which were done innocently under the old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the Constitution from passing laws of this nature and surely the Supreme Court of Alabama and the various trial courts must be barred by the Due Process clause from achieving precisely the same results by judicial construction.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *United States v. Harriss*, 347 U.S. 612, 617.

The Due Process clause of the *Constitution* requires that a Court strike down a criminal statute where it was not

"sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

This Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of Law, and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453. See also. *Rabe v. State of Washington*, 405 U.S. 313 (1972); *Wright v. State of Georgia*, 373 U.S. 284 (1963); *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

If the principles promulgated by this Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner herein for alleged conduct said to be violative of the statute at a time during 1970, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10, of the *United States Constitution*, because the State would be punishing Petitioner for conduct not criminal at the time he committed it, in that the said criminal statute did not give fair warning of the conduct which it prohibits, and the standards to be applied.

An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law,

and which was innocent when done, criminal; and punishes such action", or "that *aggravates* a *crime*, or makes it *greater* than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (emphasis supplied).

This Court has said that "no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *Kring v. Missouri*, 107 U.S. 221, 235.

Until such time as the State of Alabama enacts new legislation specifically defining prohibited "hard-core" sexual conduct, or until such time as the Supreme Court of Alabama authoritatively construes the statute to specifically define hard-core sexual conduct, to thus give fair notice to future defendants, there is no constitutionally permissible statute regulating obscenity.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
GILBERT H. DEITCH, Esq.
2005 One Hundred Colony Square
Atlanta, Georgia 30361
(404)892-8890
Attorneys for Petitioner.

Of Counsel:
FERRIS RITCHEY, Esq.

Supreme Court, U. S.
FILED
AUG 7 1975
MICHAEL RODAK, JR., CLERK

(Submitted with Consent of the Parties)

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-532

CHESTER McKINNEY, *Petitioner,*

versus

STATE OF ALABAMA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC. AND MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE*

BARBARA SCOTT
Attorney for Amici Curiae
522 Fifth Avenue
New York, New York 10036

STEPHEN H. SCHWARTZ
of Counsel

TABLE OF CONTENTS

	PAGE
Interest of *Amici Curiae*	1
Preliminary Statement	3
Statement of Facts	4
Summary of Argument	6
ARGUMENT:	
I.—Prior civil procedure laws generally are the preferred means of obscenity regulation	7
II.—The Alabama prior civil-criminal law is unconstitutional by denying petitioner his due process right to be heard	8
III.—Prior civil procedure laws in other States utilize procedures that avoid the constitutional infirmities of the Alabama statute	12
CONCLUSION	15
Certificate of Service	16

Table of Authorities

CASES:

Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864) 12

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 6, 9, 10, 11

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 13

Goss v. Lopez, 419 U.S. 565 (1975) 6, 11

Helms v. State, 35 Ala. App. 187, 45 So.2d 170 (1950) n5

PAGE

Cases (Cont'd):

Interstate Circuit, Inc v. Dallas, 390 U.S. 676 (1968) 7

Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) .....6, 7, 9, n10, passim

Kois v. Wisconsin, 408 U.S. 229 (1972) (*per curiam*) 7

Lanzetta v. New Jersey, 306 U.S. 451 (1939) .. 7

Marcus v. Search Warrant, 367 U.S. 717 (1961) 7

McKinney v. State, 292 Ala. 484, 296 So.2d 228 (1974) 5

Meyer v. Nebraska, 262 U.S. 390 (1923) 9

Miller v. California, 413 U.S. 15 (1973) 7, 8, 13

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) 6

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 6, 7, 8

Piano v. State, 161 Ala. 88, 49 So. 803 (1909) .. 10

Pointer v. Texas, 380 U.S. 400 (1965) 10

Rabe v. Washington, 405 U.S. 313 (1972) (*per curiam*) 7

Roth v. United States, 354 U.S. 476 (1957) 7

Smith v. California, 361 U.S. 147 (1959) 7

United States v. Carlisi, 32 F.Supp. 479 (E.D.N.Y. 1940) n5

United States v. DeAngelo, 138 F.2d 466 (3rd Cir. 1943) n5

PAGE

Cases (Cont'd):

United States v. Harriss, 347 U.S. 612 (1954) .. 7

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) n10

Statutes:

Code of Ala., Tit. 14, ch. 64A, §§ 374(1)-374-(16) .....2, 3, 4, 5 passim

N. Car. Gen. Stats., §§ 14-190.1—14-190.11 (1974 Supp.) 6, 13, 14, 15

N. Dak. Century Code, §§ 12.1-27.1-01, 12.1-27.1-05 —12.1-27.1-12 (1975 Supp.) 6, 13

Other:

Brief and Argument in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama and Appendix 6

California Senate Bill 886 (1975-76 Regular Session) n13

Petition for a Writ of Certiorari to the Supreme Court of Alabama 4

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-532

CHESTER MCKINNEY,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC. AND MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE*

Interest of the *Amici Curiae*

The Association of American Publishers, Inc. ("AAP") is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious book publishers, publish in the aggregate the vast majority of all general, educational and religious books produced in the United States. These works are distributed in thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

The International Periodical Distributors Association, Inc. ("IPDA") is the trade association for the twelve

principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers for ultimate distribution to retailers and the public throughout the United States.

The Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States.

The members of AAP, IPDA and MPAA are directly and significantly affected by the decisions of this Court in cases on the form and substance of obscenity regulation and by the ensuing legislative, judicial and prosecutorial actions which flow from these decisions.

As more states turn to interdependent civil-criminal regulatory systems [1] rather than strictly criminal systems, the decision of this Court on the Alabama statute [2] now before it will have a determinative influence on the structure of such legislative efforts. As such, the AAP, IPDA and MPAA have a direct interest in this case for it will shape the law in Alabama, where all do business,[3] and throughout the country where other states are and will be considering the same and similar kinds of legislation.

All three of the *amici* have in one form or another expressed their preference that if there is to be

[1] The terms "interdependent civil-criminal regulatory systems" or "prior civil procedures" refer to the class of statutes that provide a civil determination on the issue of obscenity before criminal liability may attach.

[2] Code of Ala., Tit. 14, ch. 64A, §§ 374(1)-374(16).

[3] Although the Alabama statute does not now cover motion pictures, its application could be extended to include motion pictures at any time by an amendment to the law by the State Legislature.

any regulation of obscenity, it proceed by civil rather than criminal action. *Amici,* however, oppose the civil procedure in the Alabama statute, in that the protections it affords are outweighed by its usurpation of fundamental due process rights.

This brief, then, is filed as a friend of the Court with the intention of assisting the Court in distinguishing between the particular problems of the statute before it and the particular advantages of prior civil procedures generally.

Although AAP, IPDA and MPAA represent commercial interests, to the best knowledge ascertainable from the record, none of the *amici* have any financial interest in the challenged materials in this case.

The *amici* requested and received permission from counsel of record for both parties to file this Brief *amici.*[4]

Preliminary Statement

This Brief is filed by *amici* in support of petitioner's contention that the Alabama statute[5] is unconstitutional on its face and as applied. Our support is expressly limited to the statute's denial of due process as alleged under the

[4] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

[5] Code of Ala., Tit. 14, ch. 64A, § 374(4).

second question[6] in the Petition for a Writ of Certiorari. Notwithstanding this constitutional infirmity of the Alabama statute, the *amici* argue that a properly drafted prior civil procedure law could incorporate procedural safeguards consistent with the requirements of due process.

This case is an appeal from a conviction under the criminal provisions of an interdependent civil-criminal statute of the State of Alabama. Code of Ala., Tit. 14, 64A, §§ 374(1)-374(16) (hereafter referred to by section number only). This statute provides that a judgment that challenged materials are obscene made in a prior civil proceeding need not be reproven in subsequent criminal prosecutions of persons given notice of judgment. The question here is whether the statute on its face and as applied denies petitioner, a non-party to the civil action, his due process right to be heard.

Statement of Facts

§ 374(5) provides that a solicitor for any judicial circuit may institute a civil action when he has reason to

[6] Petition for Writ of Certiorari to the Supreme Court of Alabama, p. 3 reads:

> "2. Whether the trial and conviction of the Petitioner under Title 14, Section 374, Code of Alabama, without determination of the obscenity *vel non* of the materials as a material element of the offense violated the First, Fifth, Sixth, and Fourteenth Amendments, because:
>
> (a) The Petitioner was deprived of his right to a fair trial and due process of law because a material element of the offense, obscenity, was not tried and proved, that element being 'incorporated' by a prior civil determination of obscenity to which the Petitioner was not a party;
>
> (b) The Petitioner was deprived of his right to a fair trial and due process of law because [the] statute denied him the right of confrontation."

believe that allegedly obscene material is or is about to be brought into the state or sold in Alabama. Pursuant to this authority, the District Attorney of the 13th Judicial District of Alabama commenced an action against certain magazines, naming as respondents person or persons not named in the record, but admittedly not including the petitioner.

On February 26, 1970, the magazines were declared obscene and on March 10, 1970, petitioner was served with notice of that judgment. The petitioner continued selling the proscribed magazines and on March 21, 1970, he was charged, pursuant to § 374(4), with selling a magazine judicially declared obscene. At his trial and at subsequent appeals of his conviction through the Alabama Supreme Court, the petitioner was denied the opportunity to challenge the prior determination of obscenity. "The only issue of fact for [the jury] to decide involved the question of selling material judicially declared to be obscene as charged in the complaint." *McKinney* v. *State,* 292 Ala. 484, 296 So.2d 228, 230 (1974).

The crucial fact here is that petitioner was neither a named party to the civil action nor given timely notice of its pendency and the right to intervene.[7] As such, at no time in the civil or criminal proceedings was the petitioner granted the opportunity under this statute to present evi-

[7] The court is not here confronted and need not decide the issue of whether a State could properly use a determination of obscenity in a prior civil proceeding in a subsequent criminal action against a person who was a party to both actions. Nor need it decide to what purpose, *i.e.* proof of obscenity, proof of scienter, that use must be limited as against the same party. For a discussion of the *res judicata*-collateral estoppel issues this would pose, see the discussion of *U.S.* v. *Carlisi,* 32 F.Supp. 479 (E.D.N.Y. 1940), *U.S.* v. *DeAngelo,* 138 F.2d 466 (3rd Cir. 1943) and *Helms* v. *State,* 35 Ala. App. 187, 45 So.2d 170 (1950) in *McKinney* v. *State,* 292 Ala. 484, 296 So.2d 228, 234 (1974) (Heflin, *C.J.* dissenting).

dence or confront or cross-examine witnesses on the issue of obscenity, the "basis of this (criminal) prosecution." Respondent's Brief and Argument in Opposition to Petition for Writ of Certiorari, page 9.

Summary of Argument

1. This court has expressed its preference for prior civil determinations, which give advance notice of what is proscribed, over bald criminal statutes in state systems of obscenity regulation. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973); *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

2. The Alabama statute presented here incorporates the notice advantage of a prior civil determination. At the same time, however, it effectively circumvents the State's criminal laws and their appended procedural safeguards. *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). As such the statute fails constitutionally by denying non-parties to the prior civil action, the petitioner here, the essential element of due process, the opportunity to be heard. *Mullane* v. *Central Hanover Bank,* 339 U.S. 306 (1950); *Goss* v. *Lopez,* 419 U.S. 565 (1975).

3. In contrast to the Alabama statute, recently enacted statutes in North Carolina [8] and North Dakota [9] provide the same notice, but also procedural safeguards required by due process of law.

---

[8] N. Car. Gen. Stats., 14-190.1–14-190.11 (1974 Supp.).

[9] N. Dak. Century Code, 12.1-27.1-01, 12.1-27.1-5–12.1-27.1-12 (1975 Supp.).

ARGUMENT

I

A prior civil procedure is the preferred means of obscenity regulation.

This Court has long held that obscenity is not subject to the blanket protections of the First Amendment. *Roth* v. *United States,* 354 U.S. 476 (1957); *Kois* v. *Wisconsin,* 408 U.S. 229 (1972) (*per curiam*); *Miller* v. *California,* 413 U.S. 15 (1973). At the same time it is equally mindful that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant,* 367 U.S. 717, 731 (1961). In circumscribing state regulatory efforts, an issue of continuing concern to this Court is that state obscenity laws provide fair notice of what is proscribed, both as a matter of criminal law, *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939); *United States* v. *Harriss,* 347 U.S. 612 (1954) and to prevent self-censorship intrusions on protected speech. *Smith* v. *California,* 361 U.S. 147 (1959); *Rabe* v. *Washington,* 405 U.S. 313 (1972) (*per curiam*); *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676 (1968).

It it is settled law that civil procedures are within the "legislature's [constitutionally permissible] range of choice" in regulating obscenity. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 441 (1957). In fact, this court previously endorsed the prior civil approach as the preferred means to provide notice under state regulatory systems. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973).

Cognizant of the "*in terrorem* effect" of criminal sanctions, *Kingsley Books, Inc.* v. *Brown, supra* at 442, this

Court approved a Georgia prior civil procedure insulating disseminators from the risk of prosecution without notice of what is proscribed. In its landmark decision, *Paris Adult Theatre I* v. *Slaton, supra,* Chief Justice Burger, speaking for the majority noted,

> "... such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Id.* at 55.

This Court has not yet confronted the direct question of whether such a procedure is constitutionally mandated. At least one member of the Court, cognizant of what Justice Brennan described as the "inherent vagueness of any definition of obscenity", *Paris Adult Theatre I* v. *Slaton, supra* at 89 (Brennan, *J.*, dissenting), is of the opinion "that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained." *Miller* v. *California,* 413 U.S. 15, 41 (1973) (Douglas, *J.*, dissenting). Although the weight of dicta supports making prior civil determinations mandatory, until it is so held, this much is clear: There is agreement in this Court that a prior civil procedure is to be preferred over a bald criminal statute in determining what is or is not subject to First Amendment protection.

II

The Alabama law is unconstitutional in failing to provide petitioner an opportunity to be heard.

The focus of the attack on the Alabama statute is that while it does provide the preferred notice advantage of a prior civil determination, its specific procedures fail to comply with the requirements of due process.

In approving a New York civil procedure law regulating obscenity, this Court did not limit its inquiry to the notice question. *Kingsley Books, Inc.* v. *Brown, supra.* Of equal import was its insistence that the procedures in the New York law comply with due process requirements. Speaking to this point, the Court said:

> "The method devised by New York in Section 22-a [now CPLR § 6330], for determining whether a publication is obscene does not differ in essential procedural safeguards from that provided under many state statutes making the distribution of obscene publications a misdemeanor." *Id.* at 443.

The teaching of this case is that if a state elects to use the preferred approach of a prior civil procedure, it must do so in a manner consistent with this Court's "insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards," *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963), for even "a desirable end cannot be promoted by prohibited means." *Meyer* v. *Nebraska,* 262 U.S. 390, 401 (1923).

The Alabama statute stands in bold contrast to the standard set out in *Kingsley* and *Bantam.* Here, the notice advantages of the prior civil approach become mere units of barter, protections gained in exchange for due process protections lost. Under its provisions, the petitioner is denied due process safeguards that would be available to him in a criminal prosecution if the state could not truncate that process by the operation of this civil-criminal procedure.

This is not the first time this Court has been confronted with a statute enabling a State to circumvent its own

criminal laws. The vice complained of here is in substance the same vice faced by the court in *Bantam.*[10]

> "Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process." *Bantam Books, Inc.* v. *Sullivan, supra* at 69-70.

If the State of Alabama could not rely on this statute, before it could obtain a conviction of the petitioner under traditional criminal laws, it would have had to prove each element of the crime charged, *Piano* v. *State,* 161 Ala. 88, 49 So. 803 (1909), including the obscenity of the materials, and afforded petitioner the opportunity to confront and cross-examine the witnesses and evidence against him. *Pointer* v. *Texas,* 380 U.S. 400 (1965). As such, the Alabama system imposes the same denial of due process this Court found unsupportable in *Bantam.*

In fact, there is a distinction between the situation in *Bantam* and the instant case which poses even more serious doubts as to the viability of the Alabama system. In

[10] In *Bantam,* the agency of the State was a non-judicial body, whereas in this case, it is a court of civil jurisdiction. That distinction, standing alone, cannot save it. The simple phrase judicial "is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 441 (1957). "The Fourteenth Amendment as now applied to the states protects the citizen against the State and all its creatures." *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943).

Bantam, the result was accomplished solely through the practices of the commission. If a party before that commission was willing to "stand his ground . . . confident . . . the book could not be condemned as obscene", *Kingsley Books, Inc.* v. *Brown, supra* at 443, nothing in the Rhode Island statute in *Bantam* denied that party a full criminal trial with all the procedural safeguards that entails. In the instant case, however, the analogous *Bantam* practices are built into the Alabama statutory scheme itself. Whereas in *Bantam* only the practices were declared unconstitutional, here the entire statute is at stake.

" 'The fundamental requisite of due process of law is the opportunity to be heard,' . . . a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether . . . to contest.' " *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975) (citations omitted). In the civil proceeding under the Alabama statute, where the obscenity issue was litigated, the petitioner was not named as a respondent and not given the opportunity to be heard.

Although § 374(6)(c) purports to require the State's Attorney to name as respondents, among others, ". . . any person in this State preparing, selling, exhibiting or commercially distributing [obscene materials]", and the petitioner met that statutory definition, the statute did not in fact compel the State's Attorney to name the petitioner as respondent.[11] From the State's perspective, in that notice of judgment is sufficient to bind the petitioner to the prior civil determination, the statute provides no incen-

[11] It is illuminating to note that the petitioner, who fits the statutory definition was excluded from the list of those named as respondents. Yet, less than two weeks after the judgment, the previously unknown petitioner suddenly became known to the District Attorney for the purpose of serving the notice of judgment which triggers criminal liability.

tive for diligent efforts to insure that all interested parties are named as respondents and given the opportunity to be heard.[12]

In the criminal proceeding under this statute it is conceded that petitioner both did not and could not litigate the obscenity issue.

Even though petitioner's "rights are to be affected [and he is] entitled to be heard," *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223 (1864), the interdependent civil and criminal provisions of this statute, viewed together, neither on their face guarantee nor in application provide the petitioner the opportunity to be heard on the crucial issue of obscenity. As such, the statute on its face and as applied denies petitioner due process of law and is unconstitutional.

III

Statutes of other States, incorporating the prior civil approach, include procedures required by due process of law.

The *amici* contend that the specific procedures utilized in the Alabama statute violate standards of due process of law. They argue, however, that the specific procedural deficiencies can be remedied by a statute that limits application of the prior civil determination to those given notice of the pendency of the civil action and the opportunity to be heard.

[12] If instead, the civil determination was binding only on those named as respondents and those given notice of the pendency of the action and the right to intervene, the State would have the requisite incentive to serve all appropriate parties. Such a system, involving mandatory prior service of the complaint rather than subsequent service of notice of judgment imposes no greater administrative burden. In each case, one service must be made, the difference being that subsequent service negates the opportunity to be heard.

This court has noted that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). Whether a particular statute meets this standard cannot be decided in the abstract, but rather must "await [the States'] concrete legislative efforts." *Miller* v. *California*, 413 U.S. 15, 25 (1973). As such, the decision in this case should be limited to the facts and the particular statute.

A number of States have recently considered legislation incorporating a prior civil procedure[13] and two States, North Carolina[14] and North Dakota,[15] have enacted laws embodying this approach. In both States, however, the newly-enacted statutes include procedural safeguards not found in the Alabama statute challenged here.

The argument of the *amici* presented here focused on two deficiencies in the Alabama statute. First, the statute authorized the use of the determination in the prior civil proceeding in the subsequent criminal prosecution of petitioner, a non-party to the civil action. Second, it enabled the State to preclude the petitioner from raising the issue of obscenity at the criminal trial. It is the view of the *amici* that a prior civil procedure law need not contain such procedures and that the new North Carolina and North Dakota laws resolve these problems in a manner consistent with the requirements of due process.

[13] For example, California Senate Bill 886 (1975-75 Regular Session) is now before the State Assembly, having passed the State Senate. That bill limits subsequent criminal prosecutions to parties to the prior civil proceeding.

[14] N. Car. Gen. Stats., 14-190.1–14.190.11.

[15] N. Dak. Century Code, 12.1-27.1-01, 12.1-27.1-05–12.1-27.1-12.

N. Car. Gen. Stats. §§ 14-190.2(a)[16] and (h)[17] (hereafter referred to by section numbers only) limit criminal prosecution for subsequent disseminations to respondents in the prior civil proceeding. In order to minimize the necessity of duplicitous civil actions, §§ 14-190.2(i)[18] and (k)[19] empower the State to bind third parties by giving them notice of the filing of the complaint and the opportunity to intervene. Only respondents and those deemed to be respondents are subject to subsequent criminal prosecution under

[16] § 14-190.2(a) reads:

> "The purpose of this section is to provide an adversary determination of the question of whether books, magazines, motion pictures, or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials."

[17] § 14-190.2(h) reads:

> "No person, firm or corporation shall be arrested or indicted for any violation of a provision of G.S. 14-190.1, G.S. 14-190.3, G.S. 14-190.4, G.S. 14-190.5, G.S. 14-190.6, G.S. 14-190.7, G.S. 14-190.8, . . . until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm or corporation is a respondent, and wherein such material has been declared by the court to be obscene . . . and until such person, firm or corporation continues, subsequent to such determination, to engage in the conduct prohibited by a provision of the sections hereinabove set forth."

[18] § 14-190.2(i) reads:

> "Any person, firm or corporation which is given written notice by registered mail of the filing of the complaint and of the judgment of the court as provided for in this section shall be *deemed a respondent* and shall be bound by the judgment of the court." (Emphasis added.)

[19] § 14-190.2(k) reads:

> "Any person, firm or corporation which is disseminating or which may disseminate the material challenged in the civil proceeding provided for in this section may intervene in said proceeding as a matter of right. Said intervenor shall have all the rights of a respondent and shall be bound by the judgment."

the North Carolina statute. As distinguished from the Alabama statute, under the North Carolina law it is persons with notice of the pendency of the action and the opportunity to be heard who come within the purview of the criminal provisions of the statute.

Again, unlike the Alabama statute, the use to which the prior civil determination may be used is carefully circumscribed under the North Carolina statute. § 14-190.2(f) reads in part,

> ". . . in any criminal action, charging violation of any other section of the Article, against any person, firm or corporation that was a respondent in such civil hearing, and involving the same material declared to be obscene under the provisions of this section, then evidence of such hearing shall be *competent and admissible as bearing on the issue of scienter only.*" (Emphasis added.)

To the extent the North Carolina statute embodies sensitive responses to the due process questions inevitably posed by statutes incorporating prior civil procedures, that statute lends weight to the argument that the Alabama statute is not only deficient, but unnecessarily deficient, in that remedies to the due process problems can and do exist.

CONCLUSION

For the reasons set forth above, the *amici curiae* respectfully submit that the judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

BARBARA SCOTT
Attorney for Amici Curiae

STEPHEN H. SCHWARTZ
of Counsel

Certificate of Service

I hereby certify that I have served three copies of this Brief of The Association of American Publishers, Inc., The International Periodical Distributors Association, Inc., and The Motion Picture Association of America, Inc. as *Amici Curiae* upon counsel of record for each of the parties by depositing copies of said Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery by air mail.

Copies of this Brief were sent to the following:

Counsel for Petitioner:

Robert Eugene Smith, Esq.
One Hundred Colony Square
1175 Peachtree Street, N.E.
Atlanta, Georgia 30361

Counsel for Respondent:

The Honorable William J. Baxley
The Attorney General
State of Alabama
Montgomery, Alabama 36130

This 7th day of August, 1975.

Barbara Scott

.....

Barbara Scott
Attorney *for Amici Curiae*

522 Fifth Avenue
New York, N.Y. 10036

Supreme Court, U. S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-532

CHESTER McKINNEY,
PETITIONER,

VS.

THE STATE OF ALABAMA
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT OF THE RESPONDENT AND REPLY TO AMICI CURIAE AND APPENDICES

WILLIAM J. BAXLEY
Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

JOSEPH G. L. MARSTON, III
Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Charles N. Parnell, III
of Counsel

Counsel for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CASES CITED	ii
TABLE OF STATUTES CITED	v
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
I. THE ALABAMA STATUTORY SCHEME	4
II. THE PROSECUTION OF THE PETITIONER	6
SUMMARY OF THE ARGUMENT	9
ARGUMENT	12
CONCLUSION	35
APPENDICIES	37
APPENDIX "A", ACT NO. 856	38
APPENDIX "B", ACT NO. 698	51
APPENDIX "C", CROSS REFERENCE	54
CERTIFICATE OF SERVICE	56

TABLE OF CASES CITED

Page

Ballew v. Alabama,
—U.S.—, 42 L. Ed 2d 830, 95 S.Ct 816
(1975) 6, 12, 20, 35

Ballew v. State,
292 Ala. 460, 296 So. 2d 206 (1974) 6, 12, 20, 35

Bush v. Tuscaloosa,
50 Ala. App. 44, 276 So. 2d 629 (1973) 5

Cox v. State,
280 Ala. 318, 193 So. 2d 759 (1967) 26

Curtis Publishing Company v. Butts,
388 U.S. 130, 18 L. Ed. 2d 1094, 87 S.Ct.
1975 (1967) 32

Ex parte State,
262 Ala. 188, 78 So. 2d 322 (1955) 5

Gilbert v. California,
388 U.S. 263, 18 L. Ed. 2d 1178, 87 S.Ct 1951
(1967) 10, 14

Ginsberg v. New York,
390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct 1274
(1968) 17

Ginsberg v. United States,
383 U.S. 463, 16 L.Ed 2d 31, 86 S.Ct 942
(1966) 10, 17, 18

Hamling v. United States,
418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct 2887
(1974) 9, 10, 11, 12, 14,
17, 18, 22, 26, 32, 33, 34, 35

Jackson v. Denno,
378 U.S. 368, 12 L. Ed. 2d 908, 84 S.Ct 1774
(1964) 10, 14, 15

Jenkins v. Georgia
418 U.S. 153, 41 L. Ed. 2d 642, 94 S.Ct 2750
(1974) 10, 14, 15, 16, 28

Kaplan v. California,
413 U.S. 115, 37 L. Ed. 2d 492, 93 S.Ct 2680
(1973) 10, 18, 22, 26

McKinney v. State,
292 Ala. 484, 296 So. 2d 228 (1974) 1, 9, 12, 27, 28, 35

McKinney v. Tuscaloosa,
49 Ala. App. 21, 268 So. 2d 488 (1972) 5

Memoirs v. Massachusetts,
383 U.S. 413, 16 L. Ed. 2d 1, 86 S.Ct 975 (1966) 34

Miller v. California,
413 U.S. 15, 37 L. Ed 2d 419, 93 S.Ct. 2607
(1973) 9, 10, 12, 13, 15, 16
17, 18, 22, 24, 31, 33, 34, 35

Owens v. State,
293 Ala. 769, 302 So. 2d 243 (1974) 26

Owens v. State,
53 Ala. App. 553, 302 So. 2d 240 (1974) 26

Paris Adult Theater I v. Slaton,
413 U.S. 49, 37 L. Ed 2d 446, 93 S.Ct 2628
(1973) 10, 14, 18, 22, 26, 28

Pierce v. Alabama,
—U.S.—, 42 L. Ed 2d 830, 95 S.Ct 816 (1975) 12, 35

Pierce v. State,
292 Ala. 473, 296 So. 2d 218 (1974) 12, 35

Rosen v. United States,
161 U.S. 29, 40 L.Ed 606, 16 S. Ct 434 (1896) 9, 17, 32

Roth v. United States,
354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct 1304 (1957) 9, 16, 17, 35

Smith v. California,
361 U.S. 147, 4 L. Ed 205, 80 S.Ct 215 (1959) 11, 23, 30

United Artists Corporation v. Wright,
(M.D. Ala. 1974) 368 F. Supp. 1034 ..... 6, 20

United States v. Anderson,
(2nd. Cir, 1968) 394 F. 2d 743 ..... 10, 14

United States v. Hashmall,
(D.D.C., 1951) 97 F. Supp 42 ..... 10, 14

United States v. Wade,
388 U.S. 218, 18 L. Ed 2d 1149, 87 S.Ct 1926 (1967) 10, 14

United States v. Wurzbach,
280 U.S. 396, 74 L.Ed 508, 50, S.Ct 167 (1930) 11, 32

Vachon v. New Hampshire,
414 U. S. 478, 38 L. Ed 2d 666, 94 S.Ct 664 (1974) 30

Visual Educators v. Koeppel,
289 Ala. 410, 268 So 2d 22 (1972) 28

TABLE OF STATUTES CITED

Page

First Amendment to the Constitution of the United States 9, 10, 13, 14, 15, 16, 17, 18, 19, 23, 31, 32

Title 18, United States Code, Section 1461 33

Title 28, United States Code, Section 1257(3) 1

Act No. 856, Acts of Alabama, 1961, Volume II, Page 1310 ..... 3, 4, 6, 27

Section 4 ..... 4, 11, 21, 24

Section 5 4

Section 6 21

Section 8 21

Act No. 698, Acts of Alabama, 1969, Volume II, page 1252 ..... 3, 5, 6

Section 2 5

Section 3 ..... 5, 34

Section 4 ..... 5, 11, 28, 29

Code of Alabama, 1940 (Recompiled 1958)

Title 14:

Chapter 64A 7

Section 374 ..... 3, 45

Sections 374 (1) - 374 (16) 3, 4

Sections 374 (16j) - 374(16o) 3, 5

TABLE OF OTHER AUTHORITIES CITED

Page

20 Am. Jur. 2d., Courts, Sections 118-119 ..... 10, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-532

CHESTER McKINNEY,
PETITIONER,

VS.

THE STATE OF ALABAMA
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The Judgment of the Circuit Court of Jefferson County, Alabama affirmed without opinion by the Court of Criminal Appeals of Alabama. This order is not reported.

The opinion of the Supreme Court of Alabama affirming the Judgment of the Court of Criminal Appeals of Alabama is reported as follows:

McKinney v. State 292 Ala. 484, 296 So. 2d 228 (1974)

JURISDICTION

The jurisdiction of this honorable court is invoked under 28 U.S.C. 1257(3). The writ was granted on June 23, 1975.

QUESTIONS PRESENTED

1. Where a publication is determined to be obscene in an *in rem* proceeding, pursuant to a state statute, by a court of competent jurisdiction which has before it a copy of the publication, following an adversary hearing, may such determination be considered binding as to the obscene status of the publication throughout the community, as defined by state law?

2. Does the decision of the Supreme Court of Alabama in this case, in the context of this record, stand for more than the proposition that the prior civil determination of obscenity, *vel non*, was *prima facie* evidence of obscenity? If not, is such a rule constitutional?

3. A. Does a State Obscenity Statute which requires proof that the accused (1) knew the contents of the alleged obscene material and (2) knew that it had been judicially declared obscene as conditions to conviction, meet the *scienter* requirements of the Constitution of the United States?

B. Does a complaint initiating an obscenity prosecution which alleges that the accused (1) knew the contents of the material and (2) knew that it had been judicially declared obscene, meet the *scienter* requirements of the Constitution of the United States?

C. In an obscenity prosecution, where the state proves the following:

1. The accused operated an "adult" bookstore,

2. The accused was served with a written notice that the material at issue had been judicially declared obscene, and

3. That immediately prior to the sale at issue, the accused was shown the contents of the material, has the state met the burden of proving *scienter* imposed by the Constitution of the United States?

4. Where a decision of the Supreme Court of the United States enlarges the definition of "obscenity" for purposes of the First Amendment and a State Supreme Court interprets a State Statute, passed before said decision, to require in those prosecutions initiated prior to said decision but which were still pending when it was rendered, that the materials at issue must be obscene under both the earlier and the later definitions of "obscenity", is such a statute as interpreted and applied repugnant to the Constitution of the United States?

STATUTORY PROVISIONS INVOLVED

Act No. 856 of the 1961 Session of the Alabama Legislature, unofficially codified at Title 14, Sections 374(1)-374(16) of the Code of Alabama, 1940 (recomp. 1958). This statute is voluminous and is included as Appendix "A" to this brief.

Act No. 698 of the 1969 Session of the Alabama Legislature, unofficially codified at Title 14, Sections 374(16j)-374 (16o), of the Code of Alabama 1940 (recomp. 1958). This statute is voluminous and is included as Appendix "B" to this brief.

For the convenience of this Honorable Court, the official and unofficial reports of these statutes are cross referenced in Appendix "C" of this brief.

STATEMENT OF THE CASE

I

THE ALABAMA STATUTORY SCHEME UNDER WHICH THE PETITIONER WAS CONVICTED

The petitioner attacks an Alabama Statutory Scheme. It would appear essential to this Honorable Court's consideration of this case, that this scheme be revealed as whole rather than in piecemeal fashion.

The statutory scheme under which the petitioner was convicted is based on two statutes passed nearly a decade apart.

The first of these is Act No. 856 of the 1961 Session of the Alabama Legislature. This Act will hereinafter be referred to as the "1961 Act". (See Appendix "A" to this Brief). This statute has been unofficially codified as Title 14, Sections 374(1)-374(16) of the Code of Alabama, 1940 (recomp. 1958). (The respondent submits an Appendix "C", a cross reference table for the convenience of the court.)

The 1961 Act provides criminal penalties for, among other things, the possession with intent to sell or selling any mailable matter with knowledge of its contents, known by the possessor or seller to have been judicially declared to be obscene. Section 4 (1) of the 1961 Act, Appendix "A". The Act further provides for an *in rem* adversary action for the judicial determination of the obscenity, *vel non*, of allegedly obscene materials. Sections 5-11 of the 1961 Act, Appendix "A".

The second statute which is relevant to this proceeding

is Act 698 of the 1969 Session of the Alabama Legislature. This Act will be hereinafter referred to as the "1969 Act". See Appendix "B" to this Brief. This Act is unofficially codified as Title 14, Sections 374(16j)-374(16o), Code of Alabama, 1940 (recomp. 1958) (See Appendix "C").

The 1969 Act provides criminal penalties for, among other things, selling obscene materials. Sections 2 and 3 of the 1969 Act. Appendix "B". The most relevant portion of the 1969 Act is Section 4. This Section forbids the commencement of any prosecution under the 1969 Act, unless the party to be prosecuted is first advised in writing, by one of certain specified officials, that there is reasonable cause to believe that specified materials which he is selling, etc., are obscene and the party sells, etc., the materials after such warning. Section 4 (a) and (b) of the 1969 Act, Appendix "B". The judicial constitution has held the written warning to be an absolute pre-condition to prosecution[1] and that it must be shown to have been actually served on the defendant.[2] The section further provides that upon receipt of such written warning, the party may within thirty (30) days thereafter seek Declaratory Judgment of the obscenity, *vel non*, of the materials. The statute provides that the commencement of such an action does not in itself act as a stay of the proceedings under the Act,[3] but preliminary in-

[1] McKinney v. Tuscaloosa 49 Ala. App. 21, 268 So. 2d 488 (1972).

[2] Bush v. Tuscaloosa 50 Ala. App. 44, 276 So. 2d 629 (1973).

[3] The reason for this provision is that the Declaratory Judgment action provided for by the Act is obviously to be a de novo proceeding in which the prior warning and the findings on which it was based would have no presumption of correctness and the Government would have the burden of proving obscenity. The commencement of such de novo actions automatically stay further proceedings unless the statute specifically provides otherwise. See Ex Parte State 282 Ala. 188, 78 So. 2d 322 (1955). Without this provision a purveyor of hard core pornography could, having received the warning, file for Declaratory Judgment and continue to sell his goods while the suit pended even though the materials are patently obscene under both the Constitution and the Statutes.

junctions or other temporary relief are available under the Rules of Civil Procedure.[4]

The petitioner was convicted under the 1961 Act, but he was first warned under the 1969 Act.

II

THE PROSECUTION OF THE PETITIONER

Following the petitioner's conviction in the Jefferson County Criminal Court and appeal therefrom, he was charged by complaint with exhibition, sale and possession with intent to sell a magazine, "New Directions", Number 16, Volume 4, with knowledge of its contents, knowing that it had been judicially determined to be obscene, in violation of Title 14, Section 374(4) of the Code of Alabama [Section 4 of the 1961 Act, Appendix "A"]. (R 19-22).

To the complaint, the Petitioner entered a plea of not guilty. (R. 34).

The evidence on the trial of the case was without conflict.

On February 26, 1970, the Circuit Court of Mobile County, Alabama, issued a final decree after an adversary

[4] A federal three judge court on January 5, 1975, ruled Section 4 (a) unconstitutional in that the warning required by it imposed a prior restraint on free expression; that court further ruled that the statute, the 1969 Act, was not severable and declared it invalid **in toto**, even though no other defects were found in it. **United Artists Corp. v. Wright** (M.D. Ala., 1974) 368 F. Supp. 1034. Subsequently, the Alabama Supreme Court in another case concurred in the invalidation of Section 4 (a) but held the statute to be severable, and, therefore, held the 1969 Act, less Section 4(a), to be constitutional. **Ballew v. State,** 292 Ala. 460, 296 So. 2d 206 (1974) cert. den. ——— U. S. ———, 42 L. Ed2d 830, 95 Sect. 816 (1975).

proceeding in conformity with the 1961 Act, discussed above. This decree declared the magazine "New Directions", No. 16, Volume 4, to be obscene within the meaning of the First Amendment and Alabama Law. (R. 100-102)

Twelve (12) days later, on March 10, 1970, Charles H. Barnes, an Assistant Attorney General, and D. H. Johnson, an investigator for the Alabama Attorney General's Office, went to the Paris Bookstall in Birmingham, Jefferson County, Alabama. The Paris Bookstall was a business establishment operated by the petitioner. The business was marked with a flashing neon sign reading "Paris Bookstall", there was a sign shaped like a woman reading, "Adult Bookstore", and there were signs inside and out reading, "For Adults Only". (R. 52-53, 65-68, and 73-75).

On that date, March 10, 1970, Mr. Barnes served the petitioner with a written notice that a number of magazines being offered for sale by the petitioner, including "New Directions", No. 16, Volume 4, had been judicially found to be obscene. The notice specified each of the magazines and gave the Court, case number and date of the decree declaring each of them to be obscene. The notice further stated that it was given pursuant "to Chapter 64A, Title 14, Code of Alabama, 1940 (recompiled 1958)", this being the unofficial codification of the Alabama law on obscenity and includes both the 1961 and the 1969 Acts, discussed above. When, on the trial of the case, the petitioner objected to the State's introducing a copy of the notice on the grounds of the Best Evidence Rule, the trial court initiated an inquiry into the whereabouts of the original. The State's witness stated that he had not seen the original of the notice since it was served on the petitioner. Counsel for the petitioner was asked to inquire of the petitioner concerning the original of the notice. Counsel, after the inquiry of the petitioner,

advised the Court that the Petitioner remembered receiving a letter from Mr. Barnes but that it was not available to the court. (R. 53-62 and 74-76).

Three (3) weeks after service of the notice, on March 31, 1970, Mr. Barnes and Mr. Johnson returned to the Paris Bookstall and found that the petitioner was still selling several of the magazines named in the notice, including "New Directions", Number 16, Volume 4. At that time, Mr. Barnes selected a copy of "New Directions", Number 16, Volume 4, and several other magazines. He flipped through the magazines in petitioner's presence showing them to the petitioner. The petitioner with reference to one of the other magazines, not "New Directions" but also one named in the notice, stated:

> "Oh, my God, here is one that I missed" (R. 93-95 and 97).

Mr. Johnson then purchased the magazines, including "New Directions", Number 16, Volume 4, from the petitioner. (R. 62-65, 76-77, 86-95 and 97)

When the State moved to introduce the magazine, the petitioner objected on the grounds, among others, that the sole issue in the case was whether or not the petitioner had after warning, sold a magazine which had been judicially declared to be obscene and, therefore, argued the petitioner, the magazine ought not be introduced, since the question of obscenity *vel non* was not at issue. The trial court agreed with the petitioner, but stated and ruled that the magazine would be evidence of the sale. The trial court continued;

> "The Court feels that it would be the court's duty to limit the purpose for which the magazine is admitted and to instruct the jury not to determine any questions of obscenity of the magazine." (R.81).

Subsequently, the magazine was introduced. (R. 80-82 and 86-88).

After the state rested, the petitioner moved to exclude the State's evidence, which motion was overruled. The defense offered no evidence. (R. 106-114).

The trial court charged the jury that the question of the obscenity of "New Directions" was not before them. The petitioner made no objection to this portion of the charge. (R. 120-122 and 123).

The petitioner was found and adjudged guilty and appealed to the Court of Criminal Appeals of Alabama. (R. 34-36). The Court of Criminal Appeals affirmed the conviction without opinion. On certiorari, the Supreme Court of Alabama affirmed the judgment of the Court of Criminal Appeals in *McKinney v. State* (292 Ala. 484, 296 So.2d 228 [1974]). (R. 2-8).

SUMMARY OF THE ARGUMENT

I. Assuming, *arguendo*, the accuracy of the petitioner's analysis of the Alabama Supreme Court's decision, the decision is clearly correct. Obscene materials are utterly without First Amendment protection. *Rosen v. United States* 161 U.S. 29, 40 L.Ed.606, 16 S.Ct. 434 (1896); *Roth v. United States* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S. Ct. 1304 (1957); *Miller v. California* 413 U.S. 15, 37, L.Ed.2d 419, 93 S. Ct. 2607 (1973); *Hamling v. United States* 418 U.S. 87, 41 L.Ed.2d 590, 94 S. Ct. 2887 (1974). In dealing with the question of obscenity, *vel non*, we are concerned with the

status of a thing, i.e., whether or not it is protected by the First Amendment at all. Such constitutional questions are addressed first to the courts. *Jackson v. Denno* 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774 (1964); *United States v. Wade* 388 U.S. 218, 18 L.Ed.2d 1149, 87 S. Ct. 1926 (1967) *Gilbert v. California* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S. Ct. 1951 (1967); *United States v. Hashmall* (D.D.C., 1951) 97 F. Supp. 42. Although, following a judicial determination adverse to the claimant, the State may allow the jury to make a second determination, this is not required. *Jackson v. Denno*, supra; *United States v. Anderson* (2d Cir. 1968) 394 F.2d 743. The decisions of this Honorable Court indicate that these same principles apply to First Amendment questions. *Miller v. California*, supra; *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed.2d 642, 94 S. Ct. 2750 (1974). Therefore a judge in a civil proceeding may determine the question of the obscenity, *vel non*, of a material. *Paris Adult Theator, I v. Slaton* 413 U.S. 49, 37 L.Ed.2d 446, 93 S. Ct. 2628 (1973). Since an alleged obscene publication is an object which can be brought into court and examined, and its obscenity or non-obscenity, *vel non*, can be determined from its contents, it would appear appropriate and advantageous to all concerned to determine that question in a civil *in rem* proceedings. *Hamling v. United States*, supra; *Paris Adult Theator I v. Slaton* supra; *Kaplan v. California*, 413 U.S. 115, 37 L.Ed 2d 492, 93 S. Ct. 2680 (1973); *Ginsberg v. United States* 383 U.S. 463, 16 L. Ed2d 31, 86 S. Ct. 942 (1966). *In rem* proceedings determine the status of a thing or *res* not the rights of persons. 20 Am.Jur.2d, *courts* Sections 118-119. A finding that a given copy of a publication is obscene or non-obscene binds all the world as to all substantially identical copies of the publication on the issue of obscenity, *vel non*. On receiving notice of the judicial determination, the petitioner was bound by it and was liable

BEST COPY AVAILABLE

under the statute when he disregarded the judicial determination. The cases relied on by the petitioner are clearly distinguishable.

II. The Petitioner's claim that under the decision of the Alabama Supreme Court he was bound by the civil *in rem* determination of obscenity, *vel non*, goes considerably beyond the language of the State Supreme Court. The Alabama Supreme Court's opinion in the context of this case could mean no more than that the decree in the civil proceeding was *prima facie* evidence of obscenity. The language of the opinion suggests that the question could be re-opened. There were means by which the petitioner could have tested the binding effect of the civil decree, including a civil proceeding in which he would not have had to risk criminal liability. Section 4(c) of the 1969 Act, Appendix "B". He used none of these remedies. Neither the petitioner nor anyone else knows the extent to which persons who were not parties to the civil proceeding are bound by it, because no one has ever attempted to collaterally attack such a decree. And, the petitioner certainly did not here.

III. The statute requires *Scienter* in two forms: First, the accused must have knowledge of the contents of the publication, and, Second, he must know the publication to have been judicially determined to be obscene. Section 4(1) of the 1961 Act, Appendix "A". The complaint alledged both forms of *Scienter* in the petitioner. (R. 19) The evidence in this case met and considerably exceeded the minimum *Scienter* requirements laid down by this Honorable Court. *Smith v. California* 361 U.S. 147, 4 L.Ed.2d 205, 80 S. Ct. 215 (1959); *United States v. Wurzbach* 280 U.S. 396, 74 L.Ed. 508, 50 S. Ct. 167 (1930); *Hamling v. United States* 418 U.S. 87, 41 L.Ed.2d 590, 94 S. Ct. 2887 (1974).

IV. The decisions of the Alabama Supreme Court, including that issued in the instant case, hold that where prosecutions were instituted prior to the decision of this Honorable Court in *Miller v. California*, (413 U.S. 15, 37 L.Ed.2d 419, 93 S. Ct. 2607 [1973]) but where the cases were still pending after *Miller*, the materials must be obscene under both the pre-*Miller* and the *Miller* standards to sustain the prosecutions. *Pierce v. State* 292 Ala. 473, 296 So.2d 218 (1974) Cert. den. U.S. , 42 L.Ed.2d 830, 95 S. Ct. 816; *Ballew v. State*, 292 Ala. 460, 296 So.2d 206 (1974) Cert. den. U.S. , 42 L.Ed.2d 830, 95 S. Ct. 816; *McKinney v. State* 292 Ala. 484, 296 So.2d 228 (1974), (R. 2-16). This fully complies with the rules laid down by this Honorable Court. *Hamling v. United States*, 418 U.S. 87, 41 L. Ed.2d590, 94 S. Ct. 2887 (1974).

ARGUMENT

I

As the petitioner and the *amici* analyze the decision of the Supreme Court of Alabama, the petitioner was utterly bound by the civil determination of the obscenity, *vel non*, of "New Directions". In the petitioner's view, he had no opportunity to question the validity of the determination, yet he was bound by it. The Respondent State respectfully submits that this analysis of the Alabama Supreme Court's decision goes considerably beyond its language and ignores the relevent state law. These matters will be discussed in the next section, but for now, the respondent will assume the correctness of this analysis.

This is an obscenity case; it raises the question of how the obscenity of a magazine, book, film, etc. may be determined. At the outset it is essential to note that the word

"obscenity" for the purposes of state prosecutions, such as this one, denotes two bodies of materials, one necessarily included in the other but not necessarily including all of the other. The first of these includes those materials which by reason of their obscenity are excluded from the protection of the First Amendment. However, the fact that a material is obscene for First Amendment purposes does no more than deprive it of the protection of the Amendment. There is no requirement that the states outlaw materials which are obscene for First Amendment purposes. However, the states may regulate or suppress any or all such materials, limited only by the Equal Protection and Due Process provisions of the Fourteenth Amendment.

The determination of whether or not a material is obscene for First Amendment purposes is to be made on the basis of the following definition:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . [citations omitted] . . .
>
> (b) whether the work depicts or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 37 L. Ed. 2d 419, 431, 93 S. Ct. 2607 (1973).

One of the first questions which must be addressed is whether or not this determination must be by a jury. This Honorable Court has held that a jury may determine the question of obscenity for First Amendment purposes. *Miller*

v. California, 413 U.S. 15, 27, 37 L. Ed. 2d 419, 432, 93 S. Ct. 2607 (1973); *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). On the other hand, this Honorable Court was upheld and engaged in Judicial determinations of obscenity. *Paris Adult Theater I v. Slaton* 413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); *Jenkins v. Georgia* 418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974).

The question of whether or not a particular expression is protected by the First Amendment is a question of constitutional rights. If the law is, and it obviously is not, that juries are the final authority on the question of obscenity, this is a rather sharp departure from the rules prevailing in other Constitutional areas. Surely, a trial judge could not wash his hands of a Fourth Amendment question and turn the matter of an alleged illegal search over to a jury. Questions relating to the voluntariness of confessions must be determined by a judge. *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964). Questions relating to the fact and the effects of constitutionally defective lineups are for the Court. *United States v. Wade* 388 U.S. 218, 242, 18 L. Ed. 2d 1149, 1166, 87 S. Ct. 1926 (1967); *Gilbert v. California*, 388 U.S. 263, 272, 18 L. Ed. 2d 1178, 1186, 87 S. Ct. 1951 (1967). Of course, all of these determinations involve findings of fact, but claims of constitutional rights are addressed first to the courts on the facts and the law. *United States v. Hashmall*, (D.D.C., 1951) 97 Fed. Supp. 42 After the court has made a determination against the constitutional claimant, the question may be referred to a jury under the law of the state. *Jackson v. Denno*, note 8, 378 U.S. 368, 378, 12 L. Ed. 2d 908, 916, 84 S. Ct. 1774 (1964) But, this is not required. *United States v. Anderson* (2nd Cir. 1968) 394 F. 2d 743, 747.

The question of First Amendment protection for alleged obscene materials is obviously one both initially and finally for the judiciary. Otherwise, there would be no way to relieve society or an individual of a jury determination finding Michaelangelo's "David" or Beethoven's Third Symphony, "Eroica", obscene. Thus, in *Jenkins v. Georgia* (418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 [1974]) this Honorable Court reversed a Georgia conviction on the grounds that the motion picture "Carnal Knowledge" was simply not obscene.

Taking all of this Honorable Court's decisions on this point together, especially *Miller* and *Jenkins*, it appears that the question of obscenity for First Amendment purposes is, like all other questions of constitutional rights, for the Court, which after making a determination adverse to the claimant, may, under appropriate state laws, allow the jury to make a second determination but this is not required.

If it is appropriate for a judge to determine the question of obscenity, is it necessary that the Judge be the same judge who sits on the criminal case? There appears no reason why this should be required. This Honorable Court has expressly stated that the question of the voluntariness of a confession may be determined by a judge other than the trial judge. *Jackson v. Denno*, note 19 378 U.S. 368, 391, 12 L. Ed. 2d 908, 924, 84 S. Ct. 1774, (1964). It appears to have been acceptable for Judge Hocklander to have determined the issue of obscenity, while Judge Gibson sat on the petitioner's trial.

The fact that the civil determination was made in Mobile County while the petitioner was charged with selling the magazine in Jefferson County, is not raised by the petitioner, but no doubt ought to be addressed. The law ap-

pears to be clear that a state may, though it need not, follow a statewide standard for obscenity. See *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and *Jenkins v. Georgia*, 418 U.S. 153, 157, 41 L. Ed. 2d 642, 648, 94 S. Ct. 2750 (1974). Under such a statewide standard, a judge sitting in Mobile County is as competent to determine the question of obscenity as a judge sitting in Jefferson County.

Therefore, the respondent suggests that the following conclusions at this point appear obvious:

(1) The question of obscenity, vel non, for First Amendment purposes may be made by a judge without the intervention of a jury.

(2) The judge who decides the question of obscenity need not be the same judge who sits on the criminal trial.

(3) The question of obscenity may be decided by a court outside the county where the offense is committed.

The next question is: what is the nature of a finding of obscenity? In the ordinary criminal prosecution the question of obscenity is an issue between the government and the accused and its determination binds only those parties. This is because criminal prosecutions are *in personam* in nature. The result of this can be that the same materials may be found to be protected in one case and not in others. This Honorable Court has recognized this possibility and held it to be ". . . one of the consequences we accept under our jury system. . . ." *Roth v. United States*, Note 30, 354 U.S. 476, 492, 1 L. Ed. 2d 1498, 1511, 77 S. Ct. 1304 (1957) quoted and cited with approval in *Miller v California*, Note 9, 413 U.S. 15, 27, 37 L. Ed. 2d 419, 432, 93 S. Ct. 2607

(1973). There is no doubt about the need to accept such consequences. However, the specter of the sale of a given publication being protected in the case of one entrepreneur, while his competitor across the street goes to jail for selling the same publication[5], runs contrary to our principles of fair and equal treatment.

However, this sort of divergent treatment can be avoided by coming to terms with the concept of "obscenity, *vel non*". The majority of this Honorable Court has consistently held that obscenity is without First Amendment protection. See, for example, *Rosen v. United States*, 161 U.S. 29, 40 L. Ed. 606, 16 S. Ct. 434 (1896); *Roth v. United States* 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); and *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). This Honorable Court has also held that certain materials may be protected by the Amendment until and unless they are sold to children or pandered. *Ginsberg v. New York*, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968); *Ginsberg v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966) But, when confronted with the question of obscenity, *vel non*, we are concerned, not with who is exposed to the materials nor how they are advertised but with whether they are obscene for any and all purposes. We are concerned with the legal status of the materials, whether they are obscene for First Amendment purposes or not. It is most difficult to conceive of an argument that would suggest that a given material may be obscene as between the State and one party but not obscene as between the State and another. Either, the thing is obscene or it is not. There is no halfway. The obscenity,

---

[5] It could, of course, be argued that this is one of the risks one runs in operating an "Adult" bookstore.

vel non, of a publication arises from the thing itself and can be determined from the thing itself. *Hamling v. United States*, 418 U.S. 87, 100, 41 L. Ed. 2d 590, 610, 94 S. Ct. 2887 (1974); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, 37 L. Ed. 2d 446, 456, 93 S. Ct. 2628 (1973); *Kaplan v. California*, 413 U.S. 115, 121, 37 L. Ed. 2d 492, 498, 93 S. Ct. 2680 (1973); *Ginzburg v. United States*, 383 U.S. 463, 465, 16 L. Ed. 2d 31, 35, 86 S. Ct. 942 (1966) Since obscene materials are physical things which can be brought into court, it would appear appropriate to address the question of obscenity, *vel non*, in an *in rem* proceeding.

In such an *in rem* proceeding, the issue of obscenity, *vel non*, can be divorced and decided separately from all other issues; such a spotlighting of the obscenity issue would obviously lead to its more accurate determination, since all matters irrelevant to the single issue of obscenity, *vel non*, could be excluded, while all matters relevant to that issue could be given proper consideration. As Mr. Justice Douglas of this Honorable Court has noted, "obscenity cases usually generate tremendous emotional outbursts." *Miller v. California*, 413 U.S. 15, 41, 37 L. Ed. 2d 419, 441 In a *in rem* civil proceeding emotionalism can be minimized, since the object of the litigation is the legal status of a thing, rather than whether or not someone is going to jail for "expressing himself" or "purveying filfth", depending upon one's point of view. *In rem* proceedings are concerned with the status of a *res* or thing, rather than the rights of persons. 20 Am. Jur 2d, *Courts*, §§ 118 and 119. In the *in rem* proceeding involved here, the sole issue was whether or not the *res*, "New Directions", No. 16, Vol. 4, was obscene. If it had been found to be not obscene, it would have been protected by the First Amendment. But, as it was, "New Directions" was found and determined to be obscene and, therefore, has no First Amendment protection.

BEST COPY AVAILABLE

But, how far may this determination be extended? "New Directions" is a publication. Numerous identical copies of it could be, and indeed were, brought into the state. If one copy of "New Directions", No. 16, Vol. 4, was obscene in the community, in this case, the state as a whole, can it be denied that each and every one of the identical copies are equally obscene? Similarly, once a publication has been judged not obscene, all copies of it are due the protection of the First Amendment.

Such an approach provides a uniform determination of the obscenity issue. There are, however, other advantages to this approach. It provides sellers of questionable materials with relief from fear of prosecutions in which their only hope of avoiding punishment is to convince a jury that the publication is not obscene. This Honorable Court has often commented adversely on the "chilling" of First Amendment Freedoms. Yet, what could be more chilling to a bookstore operator than to be compelled to sell his wares in constant danger of a police raid that may come at any moment. Indeed any of the customers perusing his stock may be an undercover agent gathering evidence. On his arrest on an obscenity charge, such an operator's only hope of avoiding conviction for an ignominious crime, fines and imprisonment, would be to convince a randomly selected panel of his peers that the publication is not obscene. In the case of the operator of an "adult" bookstore, such as the petitioner, such a risk may be part of the business, but even a legitimate bookstore operator may sell a publication which he honestly believes to be not obscene yet find himself confronted with imprisonment because a jury reached the opposite conclu-

sion[6]. Where a prior civil determination of the obscenity, *vel non*, of a publication is used, the distributors and sellers are confronted with a single, relatively simple and risk free civil proceeding, rather than a multiplicity of high risk criminal prosecutions. There are advantages to the state in the use of prior civil proceedings. In a simple criminal proceeding, a finding of non-obscenity would bind the state only as to that defendant. Usually an acquittal would be based on a general "not guilty" verdict of a jury, which could be based on a finding of non-obscenity or on other findings not related to obscenity. Thus, at least theoretically, the defendant could be arrested for selling the same publication the next day. A prosecutor with charges against six different individuals for selling the same publication, who loses the verdict on the trial of the first, may feel compelled by duty to his office or political or other considerations, to pursue some or all of the others, even though he may feel little hope of success. This results in unnecessary harassment of defendants and waste of resources. By using the prior civil proceeding the State can obtain a certain and final determination of obscenity, *vel non*. If the Court finds the *res* not obscene no prosecutions may be brought for its mere sale to adults; the matter is closed once and for all, and prosecutors, police, and others can turn their attention elsewhere. On the other hand, if the *res* is found to be obscene, criminal prosecutions can be brought against all who sell the *res* after notice of the decree.

---

[6] It was obviously out of concern for this problem that the Alabama Legislature provided that formal written warning would be a precondition to prosecution under the 1969 Act. Section 4(a) of the 1969 Act, Appendix "B". This Section 4(a) has now been judicially excised from the Act on the grounds that it produced a "chilling" effect. See **United Artists Corp. vs. Wright** (M.D. Ala., 1974) 368 F. Supp. 1034; **Ballew v. State** 292 Ala. 460, 296 So. 2d 206 (1974) cert. den. ___ U.S. ___, 42 L. Ed. 2d 830, 95 So. Ct. 816.

The petitioner complains that he was given no notice of the civil proceedings, yet he was bound by the civil determination of the obscenity, *vel non*, of "New Directions". This complaint ignores the nature of *in rem* proceedings. The issue in such a proceeding is not the rights of a party but the status of a thing. The purpose of joining respondents in such a proceeding, so far as the *in rem* aspect is concerned, is to provide the adversary flavor, which is an essential part of our judicial system. The statute requires the joinder of and service on the author, publisher, distributors, and sellers of the alleged obscene material, so far as these are known. Section 6(c) of the 1961 Act, Appendix "A". These are the persons and corporations which are most able and willing to put up the strongest resistence to a final determination of obscenity, *vel non*. They are also the ones most likely to seek review if there is any reason to question the trial court's determination. And, these are in the best position to inform other distributors, sellers, and interested persons, not known to the State, of the pendency of the suit, so that they can join if they wish. Section 8 of the 1961 Act, Appendix "A". Thus, whatever determination comes out of the civil proceeding, the status of the *res* will have been thoroughly and vigorously litigated. Those like the petitioner, who were not directly involved in the civil proceeding are bound by that proceeding only as to the determination of the status of the *res*. Of course, the decree could have no effect on the petitioner until he learned of it. An essential element of the *corpus delecti* of the petitioner's crime is that he knew that the *res* had been judicially declared obscene. Section 4(1) of the 1961 Act, Appendix "A". This element was proved against the petitioner by proof that he was served with written notice of the determination.

The petitioner and *amici* argue that a person ought not be bound by a determination to which he was not a party.

BEST COPY AVAILABLE

But, if the civil *in rem* determination is binding only on those who are served with notice of the proceeding and given an opportunity to appear, then the State would have to ferret out each distributor and seller of a publication before it could proceed with the civil suit, by which time the matter may be mooted by the sale of all of the copies of the publication. On the other hand, if the petitioner and *amici* are correct, any outlets or individuals not served, either because the state did not find them or because they were not selling the publication at the time, would not be bound by the proceeding. This would, as a practical matter, lead to multiple civil proceedings, removing the advantage of uniformity, discussed above, from the civil proceeding. It would encourage distributors of "adult" reading matter to play a "shell game" with their merchandise, moving it from outlet to outlet as civil proceedings are filed. Finally, it must be noted that if the petitioner was not bound by the civil determination of "New Directions" obscenity, *vel non*, neither would the state have been bound by a determination that it was not obscene. Thus, in spite of such a determination, the state could file other civil proceedings or criminal prosecutions against persons who were not joined in the *in rem* proceedings. In short, if the argument of the petitioner and *amici* is accepted, all of the many advantages of the *in rem* civil proceeding, discussed above, would be wiped out.

This Honorable Court has approved the use of civil proceedings to determine obscenity, *vel non*. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973) But, these clearly are not essential to criminal prosecutions. *Miller v. California*, 413 U.S. 15. 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54, 37 L. Ed. 2d 446, 454, 93 S. Ct. 2628 (1973); *Kaplan v. California* 413 U.S. 115, 37 L. Ed. 2d 492, 93 S. Ct. 2680 (1973) *Hamling v. United States*, 418 U.S. 87, 41 L.

Ed. 2d 590, 94 S. Ct. 2887 (1974) As discussed above, there are advantages to the State in bringing a single civil proceeding on the obscenity, *vel non*, issue prior to instituting criminal proceedings, but it would be foolish for the state to preface each criminal prosecution with a civil proceeding, when the criminal proceeding itself is sufficient.

The petitioner relies heavily on *Smith v. California* (361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 [1959]), wherein this Honorable Court overturned a California Conviction. In *Smith* the accused had been arrested for selling an obscene book, subsequently the book was held to be obscene in a civil proceeding, and Smith was convicted without evidence of *Scienter*. This Honorable Court reversed the conviction but indicated that the result may have been different if *scienter* had been required and proven. In the instant case the statute makes knowledge both of the contents of the publication *and* of the Judicial determination of obscenity essential elements of the *corpus delecti*. The complaint alleged such knowledge, and the evidence proved that the petitioner had knowledge of the contents of "New Directions" and that he sold it, not only *after* the judicial determination, but, three (3) weeks *after* being formally advised in writing of the judicial determination. Obviously, *Smith* provides no refuge for the petitioner.

Much of what has been said about obscenity for First Amendment purposes applies to the question of obscenity for the purposes of the state statute. Once "New Directions", No. 16, Vol. 4, failed to pass First Amendment muster, it was in an area wherein the state may regulate, bound only by the Equal Protection and Due Process Requirements. As a result of the Civil Proceedings, "New Directions", No. 16, Vol. 4, was declared contraband, and any person who sold it, with the requisite knowledge was guilty under the statute.

The petitioner complains that he was denied his right to confrontation and to be presumed innocent until proven guilty. But this is not so. The *corpus delecti* of the crime of which the petitioner was convicted is as follows:

1. Selling . . .

2. With knowledge of its contents . . .

3. Obscene printed mailable matter . . .

4. Known by him . . .

5. To have been judicially found to be obscene.

Section 4(1) of the 1961 Act, Appendix "A". It was incumbent upon the state to prove and the state did prove each element of this *corpus delecti*. The state proved the the material was obscene by proof of the decree issued out of the civil proceeding. Of course, the petitioner could not have gone behind this decree, but he could have attacked the decree itself. For example, the petitioner could have raised the question of whether the *res* in the civil proceeding was the same as the copy he sold. He made no attempt to do this, but that is not the same as being unable to do it. Of course, a finding of any substantial difference between the *res* in the civil proceeding and the magazine he sold would have resulted in the automatic aquital of the petitioner, no matter how obscene the latter was in law or fact, because it was possession of the *res* which gave the Court its jurisdiction in the civil case, and the prior judicial determination of obscenity, *vel non*, and knowledge of it, are essential elements under the statute.

In *Miller v. California* Mr. Justice Douglas dissented, commenting in part:

". . . If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime—whether the old standards or the new ones are used the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in Ginzburg and has all the evils of an ex post facto law.

"My contention is that until a civil proceeding has p'aced a tract beyond the pale, no criminal prosecution should be sustained . . ." 413 U.S. 15, 41, 37 L. Ed. 2d 419, 441.

The Respondent State respectfully submits that the statute at issue here comes very close to meeting Justice Douglas' objections. The respondent state further submits that if the objections of the petitioner and the *amici* to the statute are sustained, it would render an extremely enlightened approach to obscenity litigation, with valuable advantages to those engaged in expression, governments and society, utterly unworkable.

II

The petitioner and amici contend that the decision of Alabama Supreme Court holds that once the civil proceeding determined the obscenity of "New Directions", the Petitioner, although not a party to the civil proceeding, was utterly bound by it and could not thereafter have questioned the determination. In the previous section the respondent conceded *arguendo* that this was a proper interpretation of the

decision, since such may well be the law of Alabama. However, the respondent-state respectfully suggests that in the context of this case such an analysis goes too far.

On the trial of the case, the petitioner objected to the State's introduction of the magazine in question on the grounds that the question of obscenity, *vel non*, was not for the jury. This Honorable Court has ruled that the alleged obscene materials are best evidence on the issue of obscenity and are the only evidence the Government need enter. *Hamling v. United States* 418 U.S. 87, 100, 41 L.Ed. 2d 590, 610, 94 S. Ct. 2887 (1974); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 56, 37 Ed 2d 446, 456, 93 S. Ct. 2628 (1973); *Kaplan v. California* 413 U.S. 115, 121, 37 L.Ed. 2d 492, 498, 93 S. Ct. 2680 (1973) Yet, as a result of the petitioner's objection, the magazine was admitted into evidence on the issue of sale only. (R. 80-82) The petitioner himself presented no evidence at all. And, the petitioner made no objection to the trial Court's charging the jury that the issue of obscenity was not for them.[7] The petitioner did, however, move to exclude the State's evidence, thereby raising the sufficiency of the evidence. The Alabama Supreme Court may well have viewed the issue of the case to be, whether there was any evidence at all of obscenity or, to put it another way, whether the decree from the civil proceeding was *prima facie* evidence of obscenity. The Court wrote thus on the point:

> "Neither McKinney nor the State introduced evidence in the trial on the question of obscenity, vel non. McKinney raised that issue in a motion to quash the complaint which the trial judge overruled. A motion to exclude the evi-

[7] Such an objection is essential to the preserving of error on appeal under Alabama law. **Cox v. State** 280 Ala. 318, 193 So. 2d 759 (1967); **Owens v. State** 53 Ala. App. 553, 302 So. 2d 240 (1974) Cert. den. 293 Ala. 769, 302 So. 2d 243.

> dence was also overruled by the trial court. The validity of the judgment of the Mobile Circuit Court was questioned by McKinney on objection to its introduction in evidence, first in the sense that he was not a party to the action, second that the State had to prove by affirmative evidence that the subject magazine was obscene in this trial."
>
> McKinney V. State 292 Ala. 484, 486-487, 296 So. 2d 228, 230 (R. 5)

The Court then discussed the 1961 Act and continued:

> "We now decide the question of whether the Mobile Circuit Court decree was binding on McKinney since he was not a party to the action and since obscenity, vel non, was not permitted as an issue by the trial court.
>
> "The Mobile action was in personam and in rem. The magazine, 'New Directions,' the subject matter in this case, was one of the res declared by the court to be obscene. The decree of the court, which was not appealed, established the status of the res, and the decree as to the status of the res was conclusive against all the world as to that status. [citations omitted]
>
> "*The status of the res, 'New Directions' being established, and there being no change in the standards of obscenity under the statute from the time of the Mobile hearing to the trial below no evidence of obscenity, vel non, was required in this case.*" 292 Ala. 484, 488, 296 So. 2d 228, 231 (R. 7) (Emphasis Supplied)

The sum total of the Alabama Supreme Court's decision is the statement, ". . . no evidence of obscenity, vel non, was

required in this case. . . ." This does not say that such evidence would have been improper whether offered by the State on the defense. It simply says that the decree alone was sufficient to prove obscenity. The question of whether or not the petitioner could have gone behind the decree and offered evidence on the issue of obscenity, *vel non*, is simply not presented by the case, because the petitioner offered none. The Court's language relating to possible changes in the standards of obscenity suggests that the petitioner could have raised that issue. And, the Court's detailed discussion of the contents of "New Directions" No. 16, Vol. 4, (292 Ala. 484, 485, 296 So 2d 228, 229, R 2-3) indicates that the Alabama Supreme Court examined the issue of obscenity, *vel non*, in the same way this Honorable Court did in *Jenkins* v. *Georgia* (418 U.S. 153, 41 L.Ed. 2d 642, 94 S. Ct. 2750 [1974]). All of this indicates that the issue of obscenity, *vel non*, was anything but closed by the civil proceeding.

If the issue of obscenity, *vel non*, was not closed by the prior *in rem* civil proceeding, the petitioner could have filed his own civil action under Section 4 (c) of the 1969 Act, (Appendix "B")., after he received the written notice. See *Paris Adult Theater* I v. *Slaton*, note 4, 413 U.S. 49, 55, 37. L. Ed. 2d 446, 455, 93 S. Ct. 2628 (1973). In Civil actions brought by individuals or others against would be censors, the burden is on the latter to prove obscenity. *Visual Educators v. Koeppel* 289 Ala. 410, 414, 268 So. 2d 22, 25 (1972) Thus, the petitioner could have raised the question of obscenity, *vel non*, without risking prosecution.

The point is, that the petitioner had available to him remedies by which he could have tested the binding effect of the civil decree. He made no use of these, yet he contends that he is utterly bound by it. How does he or we know?

The respondent state respectfully submits that in the context of this case, the Alabama Supreme Court's decision holds no more than that the decree from the prior adversary civil proceeding was *prima faciae* evidence of obscenity and, in the absence of other proof, was sufficient to support a conviction. The respondent-state further respectfully submits that this is patently reasonable and proper.

III

The Petitioner's arguments on *scienter* seem, with all due respect to learned counsel, to run in all directions at once. It is most difficult to tie any one of them down long enough to examine it, let alone answer it.

The Petitioner argues that the statute does not require the necessary *scienter*, yet the statute clearly requires that the accused have both knowledge of the contents and knowledge that materials had been judicial declared obscene. Section 4(1) of the 1961 Act, Appendix "A".

The Petitioner argues that the Complaint did not allege the necessary *scienter*, yet the Complaint alleges both knowledge of "New Directions" contents and knowledge that it had been judicially declared obscene (R. 19 and 21).

The evidence in this case shows the Petitioner to have been the operator of an "adult" bookstore. He offered "New Directions" for sale in a clear cellophane package which was sealed. The State offered to prove whole racks of similar publications, but, on the Petitioner's objection, it was disallowed. (R. 70-71) The Petitioner received formal written advice from State Representatives that "New Directions", No. 16, Vol. 4, had been judicially declared obscene; he did not bother to refer the notice to his attorney nor did he even

bother to preserve it for future reference. Three weeks later he was still selling "New Directions", No. 16, Vol. 4. Just before he made the sale at issue he was shown the contents of the magazine. Yet, he claims that there was no evidence that he knew that the magazine was obscene. The Petitioner operated on the principle that the less he knew about his merchandise, the better off he was;* he now seeks judicial approval for this principle.

The Petitioner's reliance on this Honorable Court's *per curiam* opinion in *Vachon v. New Hampshire* (414 U.S. 478, 38 L. Ed 2d 666, 94 S. Ct. 664 [1974] is not well placed. The evidence in that case did not show who took the child's money for the button. It could have been an employee or a customer or supplier's representative or someone on the premises to steal or commit other crimes. It could have been anyone! This Honorable Court wrote:

> ". . . In these circumstances, the conviction must be reversed. 'It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process.'
>
> [Citations omitted]" 414 U. S. 478, 480, 38 L. Ed. 2d 666, 669.

In the instant case the uncontradicted evidence is that the Petitioner himself sold the publication three weeks after receiving formal notice that it had been judicially declared obscene and immediately after being shown its contents.

In *Smith v. California,* (361 U. S. 147, 4 L. Ed. 2d 205,

---

*Perhaps he thought it would corrupt his morals.

80 S. Ct. 215 [1959]), also relied on heavily by the Petitioner, this Honorable Court wrote:

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." 361 U. S. 147, 154, 4 L. Ed. 2d 205, 212.

Yet, in the instant case there was eyewitness testimony that the Petitioner was shown the contents of the magazine immediately before the sale, and the Petitioner denies nothing.

In *Miller v. California,* (413 U. S. 15, 37 L. E. 2d 419, 93 S. Ct. 2607 [1973] the majority of this Honorable Court wrote as follows:

> ". . . The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.' . . . [citations omitted] *But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.*" 413 U. S. 15, 34, 37 L. Ed. 2d 419, 437. (Emphasis Supplied)

This language indicates that a least a majority of this Honorable Court now recognizes the need to allow the states to come to terms with the problem of the commercial pornographer. Certainly this Petitioner fits into the category of one

engaged in the ". . . public portrayal of hard core sexual conduct . . . for commercial gain. . . ." *Miller*, supra. If the First Amendment protects anything at all, it protects the right of the news media to expose criminal activities, yet this Honorable Court has recognized a duty in the media to conduct a reasonable investigation into the facts before it publishes an expose. See Mr. Justice Hurlan's opinion for the majority in *Curtis Publishing Company v. Butts*, 388 U. S. 130, 158, 18 L. Ed. 2d 1094, 1113, 87 S. Ct. 1975 (1967). This being the case, is it unreasonable to suggest that the operator of an "adult" bookstore ought to reasonably inform himself of the nature and contents of his stock? Surely after receiving formal advice of a publication's having been judicially declared to be obscene, a reasonable respect for the law and concern for his business would require a merchant to take a look at one of the copies of the publication in question.

This Honorable Court has long rejected the contention that the *scienter* requirement in obscenity cases is a subjective belief that the materials are obscene. *Rosen v. United States*, 161 U. S. 29, 41, 40 L. Ed. 606, 610, 16 S. Ct. 434 (1896); *Hamling v. United States*, 418 U. S. 87, 119, 41 L. Ed. 2d 590, 622, 94 S. Ct. 2887 (1974).

This Honorable Court has written:

> "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States v. Wurzback*, 280 U. S. 396, 399, 74 L. Ed. 508, 510, 50 S. Ct. 167 (1930).

This language was recently quoted by this Honorable

Court in *Hamling v. United States*, (418 U. S. 87, 124, 41 L. Ed. 2d 590, 624, 94 S. Ct. 2887 [1974]). Clearly, the *Scienter* requirement in obscenity cases does not necessitate proof that the accused actually knew that he had crossed the line, but rather requires that the Government prove that the accused knew or ought to have known that he was close to the line. An individual who runs a business of selling materials that are close to the line established by an obscenity statute clearly does so at his own risk, and he is liable whenever he crosses the line.

The Respondent, State, respectfully submits that the requirements of the statute at issue, the allegations of the Complaint and the proof in this case meet the constitutional standards and surpass them considerably.

IV

The petitioner mounts a broad attack on the statutory definition of "obscenity." On the one hand the petitioner seems to condemn the State Trial Court for following the pre-*Miller* standards, while on the other he condemns the State Supreme Court for following the *Miller* standards. One cannot help but wish the petitioner would make up his mind.

The petitioner argues that the statute is vague. In *Hamling v. United States* (418 U.S. 87, 110, 41 L. Ed. 2d 590, 616, 94 S. Ct. 2887 [1974]) this Honorable Court once again approved Title 28 U.S.C. 1461, a criminal statute outlawing the mailing of obscene materials. 18 U.S.C. 1461 refers to obscene materials in the following words: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance. . . ." The State statute, at issue, on the other hand, defines "obscene" this way:

"'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to purient interest." Section 3 of the 1961 Act, Appendix "A."

This language is considerably more definite than that approved in *Hamling*. Of course, the definition in the State statute is for use, at least initially, in a civil rather than a criminal proceeding.

In *Miller v. California* (413 U.S. 15, 37 L. Ed 2d 419, 93 S. Ct. 2607 [1973] this Honorable Court rendered an opinion whose stated and acknowledged purpose was to permit the states to suppress hardcore pornography. Yet, the petitioner argues that the first fruits of *Miller* ought to be, (1) the overturning of every then pending obscenity case, because the *memoirs*[9] standards were rejected in Miller and (2) the invalidating of every state law dealing with obscenity, because, if these were construed as following the *Miller* standards, they would be *ex post facto*. This is strange, and, more importantly, rejected in *Hamling*, supra. In that case, this Honorable Court wrote:

"The definition of obscenity, however, is not a question of fact, but one of law; the word 'obscene' as used in 18 USC § 1461, is not merely a generic or descriptive term, but a legal term of art . . . [citations omitted] . . . The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. . . ." 418 U.S. 87, 118, 41 L. Ed 2d 590, 621.

---

[9] **Memoirs v. Massachusetts** 383 U.S. 413, 16 L. Ed 2d 1, 86 S. Ct. 975 (1966).

The petitioner argues that applying the *Miller* standards to him gives the statute an *ex post facto* effect. The Alabama Supreme Court has carefully considered this question and addressed it an opinion rendered shortly before the decision in the petitioner's case. *Pierce v. State* 292 Ala. 473, 296 So. 2d 218 (1974). Under the Alabama Supreme Court's views of its pre-*Miller* decisions certain materials were unprotected and banned under the *Roth-Memiors* standards. These same materials are still unprotected and banned in addition to others under the *Miller* standards. Thus, if a party was not protected under the old standards he certainly cannot complain under the new. Implicit in this and demonstrated by the Alabama Supreme Court's decisions, including the instant case, is that both sets of standards apply to the pre-*Miller* prosecution - post-*Miller* appeal cases. Thus, to sustain the conviction in such cases the Appellate Court must find the materials obscene under both sets of standards. *Pierce*, supra, was presented to this Honorable Court for review, which this Court declined to do. *Pierce v. Alabama* ___ U.S. ___, 42 L. Ed 2d 830, 95 S. Ct. 816 (1975) See also *Ballew v. State*, 292 Ala. 460; 296 So. 2d 206 (1974) cert. den. ___ U.S. ___, 42 L. Ed. 2d 830, 95 S. Ct. 816 and *McKinney v. State* 292 Ala. 484, 296 So. 2d 228 (1974) (R. 2- 16). Thus, the Alabama Law, as construed by the Supreme Court of Alabama, is not given an *ex post facto* effect and meets the requirements with regard to the retroactivity of *Miller* laid down by this Honorable Court. *Hamling v. United States* 418 U.S. 87, 101, 41 L. Ed 2d 590, 611 94 S. Ct. 2887 (1974).

CONCLUSION

In conclusion, the State of Alabama, respondent, respectfully submits that the decision of the Supreme Court of Alabama, both as interpreted by the petitioner and in light of its

own language in the context of this case, is patently correct and that the petitioner was properly convicted. The respondent respectfully submits that the decision and judgment of the Supreme Court of Alabama are due to be affirmed and the respondent prays affirmance.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL
Office of the Attorney General
of Alabama
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36103

JOSEPH G. L. MARSTON
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
of Alabama
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36103

APPENDICIES

APPENDIX A

ACT NO. 856
ACTS OF ALABAMA, 1961
VOL. II, PAGES 1310-1316

Act No. 856 S. 242—deGraffenried.

AN ACT

To suppress traffic in obscene publications, defining terms, prescribing penalties, and providing enforcement procedures against residents or non-residents.

Be It Enacted by the Legislature of Alabama:

Section 1. TITLE. This Act shall be known as the Alabama Law on Obscenity and may be referred to by that designation.

Section 2. PURPOSE AND INTENT OF ACT. The spread of obscene publications, during the past several years, has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against such publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within this State.

Section 3. DEFINITIONS. The following words, terms and phrases used in this Act shall, for the purpose of this Act, have the meaning respectively ascribed to them in this Section:

"Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be non-mailable under the laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious, scientific or educational institution.

Section 4. CRIMINAL PROVISIONS AND PENALTIES.

(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than Two Thousand Dollars for each offense, or be both so imprisoned and fined in the discretion of the Court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than Five Hundred Dollars for each offense, or be both so imprisoned and fined in the discretion of the Court.

Section 5. MAILABLE MATTER; COMMENCEMENT OF ACTION. Whenever the Solicitor for any Judicial Circuit or County Solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is (2) in this State, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the Solicitor for the Judicial Circuit or County into which such mailable matter is sent or caused to be

sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action In Equity in the Circuit Court or any Court having Equity jurisdiction of the affected County for an adjudication of the obscenity of the mailable matter.

Section 6. ACTION TO DECLARE MAILABLE MATTER OBSCENE. The action authorized by Section 5 shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as Respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution, and of any person in this State preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; and

(f) pray for its surrender, seizure and destruction.

Section 7. ORDER TO SHOW CAUSE. Upon filing of the complaint, described in Section 6, the Solicitor or Register of the Court shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the Court shall dismiss the complaint. If the Court finds probable cause to believe such matter to be obscene it may forthwith issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter

by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the Respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order may be made in any manner provided by law and, in case of mailable matter published or edited outside the State of Alabama and of any nonresident Respondent, by registered or certified mail directed to the mailable matter or the Respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such order upon the mailable matter or any Respondent for the purposes of this Section.

Section 8. APPEARANCE, ANSWER AND TRIAL DATE.

(1) On or before the return date specified in the order to show cause, the mailable matter and each Respondent may appear and file defensive pleadings.

(2) The Court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the Court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer and other defenses by the mailable matter and other Respondents, the Court shall set a date for the trial of the case.

Section 9. PUBLIC POLICY. PROCEDURE. The public interest requires that all actions prescribed by this Act, other than criminal actions under Section 4, be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The Rules of Civil Procedure pertaining to Equity cases shall be applicable to the trial of such actions except that the time limits therein concerning notice of trial, the presentation of evidence, and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the Court finds the same to be in the public interest.

Section 10. DECREE. In the event the Court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any Respondent, prohibiting him from doing or continuing to do any thing condemned by this Act;

(b) direct any resident Respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the Court may find to be reasonable;

(c) direct all Sheriffs in the State to seize and destroy all such obscene mailable matter in the possession or under the control of any Respondent who shall fail to comply with the Court's orders;

(d) enter any other and appropriate orders to effectuate the decree or injunction.

Section 11. INJUNCTION. Every order granting an injunction shall set forth the reason for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the Respondents, to the action and upon those persons in active concert or participation by contract or arrangement with such Respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the Court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all Respondents named in the complaint and in the manner as provided in Section 7 of this Act.

Section 12. WHEN MAILABLE MATTER IS NOT EXEMPT. Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this State for sale or commercial distribution, or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of Section 4 of this Act.

Section 13. CONTEMPT. Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to Sections 10 and 11 of this Act, and who shall disobey any of the provisions thereof, shall be guilty of contempt of Court.

BEST COPY AVAILABLE

Section 14. EXTRADITION. In all cases in which a Court has entered its decree pursuant to Section 10 that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a Respondent to such decree, who cannot be found in this State, the Governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found pursuant to the laws of this State.

Section 15. PRESUMPTIONS. The possession of any three of the things enumerated in Section 4 of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor.

Section 16. NON-RESIDENTS, JURISDICTION, PROCESS, CONSENT. In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside of this State, it is the purpose of this Section to subject to the jurisdiction of the Courts of this State those persons, including non-residents, who are responsible for the importation of such matter into this State and, by such act, submit themselves to the jurisdiction of the Court of this State and any action authorized by Section 5 of this Act.

Section 17. SEVERABILITY. If any provision, clause, sentence, paragraph, section, phrase or part of this Act, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provisions, clauses, sentences, paragraphs, sections, phrases, parts or applications of this Act which can be given effect without the invalid provision, clause, sentence, paragraph, section, phrase, part or application. To this end the provisions, clauses, sentences, paragraphs, sections, phrases or parts of this Act are declared to be severable.

Section 18. REPEAL AND SAVINGS CLAUSE. All laws and parts of laws inconsistent or in conflict with this Act are, to the extent of their inconsistency or conflict, hereby repealed. This Section shall not be construed to affect any suits pending or rights existing or any liability or penalty incurred under those laws at the time this Act shall take effect.

Section 19. This Act shall become effective upon its passage, approval by the Governor or its otherwise becoming a law.

Approved September 8, 1961
Time: 1:38 P.M.

APPENDIX B

ACT NO. 698
ACTS OF ALABAMA, 1969
VOL. II, Pages 1252-1255

AN ACT

To prohibit the exposing of obscene and harmful materials to persons eighteen years of age and older; to define terms and to prescribe penalties.

Be It Enacted by the Legislature of Alabama:

Section 1. Definitions. As used in this Act.

(a) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(b) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(c) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(d) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Obscene" means that description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest, and (ii) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (iii) is utterly without redeeming social value or importance.

(g) "Hard-core pornography" means material, when considered as a whole, its predominant appeal is to prurient interest, is patently offensive to prevailing or contemporary standards, is utterly without redeeming social value or importance and in addition it goes substantially beyond customary limits of candor in describing or representing such matters.

(h) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) the character and content of any material described herein which is reasonbaly susceptible of examination by the defendant.

(ii) such term includes the calculated purveyance of filth.

(i) Mailable matter means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be non-mailable under the laws of the United States.

Section 2. Selling, exhibiting or possessing obsecene materials. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a person eighteen years of age or older:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of section 2 hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is obscene or represents hard-core pornography.

(c) Nothing in this section shall be deemed to apply to mailable matter unless such mailable matter is known by such person to have been judicially found to be obscene or to represent hard-core pornography under this act or under the provisions of any other Alabama statutes.

Section 3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to another or knowingly to sell to another an admission ticket or pass or knowingly to admit another for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse which is obscene or represents hard-core pornography.

Section 4. (a) No prosecution may be commenced against any person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is

reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.

(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the following officials: the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act.

Section 5. Any person, firm or corporation violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars ($2,000.00) for each offense, or be both so imprisoned and fined, in the discretion of the court.

Section 6. The provisions of this Act are cumulative and shall be in addition to any and all laws now enacted dealing with obscene or hard-core pornography and shall not be construed to limit or repeal other laws on such matters and shall specifically apply to the exposing of obscene and harmful materials to persons eighteen years of age and older.

Section 7. This Act shall become effective immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved September 10, 1969.

Time: 4:20 P.M.

APPENDIX C

CROSS REFERENCE OF OFFICIAL AND UNOFFICIAL REPORTS OF STATUTES INVOLVED

OFFICIAL Act No. 856, Acts of Alabama, 1961, Vol. II., p. 1310	UNOFFICIAL Code of Alabama, 1940, (Recompiled 1958),
	Title 14
Section 1	Section 374(1)
Section 2	Section 374(2)
Section 3	Section 374(3)
Section 4	Section 374(4)
Section 5	Section 374(5)
Section 6	Section 374(6)
Section 7	Section 374(7)
Section 8	Section 374(8)
Section 9	Section 374(9)
Section 10	Section 374(10)
Section 11	Section 374(11)
Section 12	Section 374(12)
Section 13	Section 374(13)
Section 14	Section 374(14)
Section 15	Section 374(15)
Section 16	Section 374(16)
Section 17	—
Section 18	—
Section 19	—

OFFICIAL Act No. 698 Acts of Alabama 1969, Vol. II, p. 1252	UNOFFICIAL Code of Alabama 1940 (Recompiled 1958)
	Title 14
Section 1	Section 374(16j)
Section 2	Section 374(16k)
Section 3	Section 374(16l)
Section 4	Section 374(16m)
Section 5	Section 374(16n)
Section 6	Section 374(16o)
Section 7	—

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, one of the attorneys for the Respondent, do hereby certify that on this _____ day of _____, 1975, I did serve the requisite number of copies of the foregoing Brief and Argument of the Respondent on the Attorneys for the Petitioner and the Amici Curiae by mailing said copies to them, first class postage prepaid in the case of Mr. Ritchey and air mail postage prepaid in the case of the others, and addressed as follows:

Honorable Eugene Smith
Attorney at Law
2005 One Hundred Colony Square
Atlanta, Georgia 30361

Honorable Gilbert H. Deitch
Attorney at Law
2005 One Hundred Colony Square
Atlanta, Georgia 30361

Honorable Ferris S. Ritchey, Jr.
Attorney at Law
Suit 405
11 West Oxmoor
Birmingham, Alabama 35209

Honorable Barbara Scott
Attorney at Law
522 Fifth Avenue
New York, New York 10036

Honorable Stephen Schwartz
Attorney at Law
522 Fifth Avenue
New York, New York 10036

_____

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL